89-291 (1)

Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

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JAMES NELSON RAMSEY,
*Petitioner,*

v.

BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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Washington D.C.
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## QUESTIONS PRESENTED

The following questions are presented:

Whether, in an administrative proceeding brought by a disciplinary board against an attorney --

1. -- due process is violated by decisionmakers who are tainted by apparent and actual bias and prejudice, specifically:

(a) where a majority of the members of an administrative "Hearing Panel" that held an evidentiary hearing on the disciplinary complaint admittedly have significant pecuniary interests that are adverse to the person over whom they sit in judgment and where they nevertheless:

(i) fail to timely disclose these interests;

(ii) decline to disqualify themselves sua sponte: and

(iii) refuse to disqualify themselves when subsequently challenged to do so? and

(b) where the "Trial Court" Chancellor, who was charged with reviewing de novo the Hearing Panel's "Findings and Judgment" and who had previously expressed his views about the Petitioner's "appalling" conduct, yet refuses to disqualify himself sua sponte?

2. -- it is a violation of due process for the charging document to confound factual averments and legal conclusions, to include allegations of misconduct completely untethered to any alleged facts, and to assert violations of

law for which absolutely no evidence was ever introduced and thus to fail to provide constitutionally adequate notice?

3. -- it is a violation of due process to impose disciplinary sanctions on the basis of an alleged disciplinary offense -- a "pattern of behavior" -- that is not included in the applicable attorney Disciplinary Rules?

4. -- due process is denied where the Hearing Panel and the Chancellor fail to make a true judicial determination of the facts and the law?

5. -- it is a violation of due process for all the decisionmakers below -- the Hearing Panel, the Chancellor, and the Tennessee Supreme Court -- to consider allegations of prior misconduct, allega-

tions which had been previously investigated, adjudicated, and dismissed?

6. -- due process is violated where no proof was adduced to support the putative offenses and where the evidence that was placed in the record was misconstrued? and

7. -- it is a breach of due process to place an elected public official on attorney disciplinary probation for a term that is specifically tied to, and coextensive with, his term in office?

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James Nelson Ramsey, Petitioner herein, respectfully prays that this Honorable Court issue a writ of certiorari in this case so as to review the judgment and opinion of the Supreme Court of Tennessee entered in the above-entitled proceeding on April 17, 1989.

## I. OPINIONS BELOW

The judgment and "Opinion" of the Supreme Court of Tennessee, dated April 17, 1989, is reported at 771 S.W.2d 116 (Tenn. 1989) and is reprinted as Appendix ("App.") A. Petitioner filed a timely "Petition for Rehearing" on April 27, 1989, App. B. The Tennessee Supreme Court denied that petition in an "Opinion" and separate order dated May 22, 1989, App. C. The "Mandate" and "Decree" of that court were entered on June 30, 1989, App. D. The final "Judgment of the Trial Court" and the accompanying "Memo" of the Chancery Court for Anderson County,

Chancellor William H. Inman ("Chancellor Inman") presiding, in Case No. 2736-7-M, dated January 13, 1988, are not reported. They are reprinted as App. E. Chancellor Inman's unreported "Memorandum Opinion", dated December 18, 1987, is reprinted as App. F. The April 8, 1987 "Findings and Judgment" ("Findings") of the Hearing Panel ("Panel") of Respondent Board of Professional Responsibility is not reported and is reprinted as App. G.

## II. JURISDICTION

The judgment of the Supreme Court of Tennessee in this case, ordering Petitioner's disciplinary suspension from the practice of law, was entered on April 17, 1989. That court denied Petitioner's petition for rehearing on May 22, 1989. This Petition is being docketed in this Court within ninety days from the entry of that decision. The jurisdiction of this

Court is invoked under 28 U.S.C. Section 1257(a).

The following federal questions are properly presented to this Court inasmuch as they were timely and appropriately raised in the courts below.

Issue No. 1(a) (Bias of Panel members) was raised in Petitioner's April 21, 1987 "Motion to Vacate Panel Decision", App. H, at 6 and by Petitioner during the May 29, 1987 Hearing on that motion. See the Transcript of that Hearing, App. I, at 36-40. The Panel denied that motion by an order dated June 11, 1987, App. J. Petitioner raised this issue before Chancellor Inman in his June 30, 1987 "Petition for the Writ of Certiorari", App. K, at 10, and in his December 14, 1987 "Trial Brief", App. L, at 13-14. Chancellor Inman ruled that this issue was not grounds for reversal in his December 12, 1987 Memorandum Opinion,

App. F at 2-3. The issue was put before the Tennessee Supreme Court in Petitioner's May 6, 1988 Appeal Brief, App. M, at 16-25. That court dismissed the significance of this issue in its April 17, 1989 opinion, App. A, at 15-16.

Issue No. 1(b) (Prejudice of Chancellor Inman) was raised in Petitioner's Appeal Brief, App. M, at 16-18 and 25-27. The Tennessee Supreme Court rejected Petitioner's contentions on this issue in its opinion, App. A, at 15-16.

Issue No. 2 (Inadequate Notice) was raised in Petitioner's September 6, 1985 "Answer", App. N, at 11 and 13, which was filed in response to Respondent's August 29, 1989 "Petition for Discipline", App. O. Neither the Panel nor Chancellor Inman addressed this issue. Petitioner raised this issue in his Appeal Brief, App. M, at 28-38. The Tennessee Supreme Court rejected Petitioner's

argument on this issue in its Opinion, App. A, at 16-18.

Issue No. 3 (Conviction of a Non-offense, a "Pattern of Behavior") was raised in Petitioner's Appeal Brief, App. M, at 58-59. The Tennessee Supreme Court did not address this issue at all.

Issue No. 4 (Lack of a True Judicial Determination) was raised in Petitioner's Appeal Brief, App. M, at 38-41. The Tennessee Supreme Court rejected these arguments in its Opinion, App. A, at 18.

Issue No. 5 (Improper Resurrection of Dismissed Complaints) was raised before the Panel in Petitioner's Answer, App. N, at 11-12, in his September 12, 1985 "Amended Answer", App. P , at 1-3, in his first November 16, 1987 "Motion to Strike", App. Q, at 1-2, in his second November 16, 1987 "Motion to Strike", App. R, at 1-2, in his third November 16, 1987

"Motion to Strike", App. S, at 1-2, and in his fourth November 16, 1987 "Motion to Strike", App. T, at 2. The Panel rejected these arguments in its Findings, App. G, at 5-6 and 12-13. Petitioner raised this issue before Chancellor Inman in his Petition for the Writ, App. K, at 11-12 and in his Trial Brief, App. L, at 2-3 and 12. Chancellor Inman rejected this argument in his Memorandum Opinion, App. F, at 3-4. Petitioner put this issue before the Tennessee Supreme Court in his Appeal Brief, App. M, at 41-44. That court did not comment on these arguments at all.

Issue No. 6 (Insufficient Proof) was raised before Chancellor Inman by Petitioner's Trial Brief, App. L, at 5. Chancellor Inman rejected this argument in his Memorandum Opinion, App. F, at 4-5. Petitioner put this issue before the Tennessee Supreme Court in his Appeal

Brief, App. M, at 59-63. That Court repudiated those views in its Opinion, App. A, at 28-33.

Issue No. 7 (Imposition of a Non-judicial Sanction) was raised before the Tennessee Supreme Court in Petitioner's Petition for Rehearing, App. B, at 18. That court refused to discuss that argument.

## III. CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall ... deprive any person of life, liberty, or property without due process of law ... ."

## IV. STATEMENT OF THE CASE

### A. Background

Petitioner was admitted to the Tennessee Bar in 1972. He has spent his entire professional life in Anderson

County, Tennessee. In 1974, he was elected County Attorney, serving with distinction until 1978.

The Anderson County Circuit Court has two judges -- a Chancellor and a Circuit Court Criminal Judge. In 1977, then-Governor Ray Blanton appointed Allen V. Kidwell as the Chancellor. The next year, Governor Blanton appointed Chancellor Kidwell's brother-in-law, James B. "Buddy" Scott (who was then the County District Attorney General) as the Circuit Court Criminal Judge. Judge Scott in turn asked Governor Blanton to appoint his protege, Mike Lawson, as his successor as District Attorney. Judge Scott's request was granted and Mr. Lawson was appointed.

Judge Scott's actions and Governor Blanton's appointments were not, however, universally acclaimed. In the 1978 general election, Petitioner unexpectedly ran against the Governor's appointee and

the Judge's friend, campaigning on a theme of clean government. He won.

Shortly after Petitioner was inaugurated as the Anderson County prosecutor in 1978 he began to honor and discharge his campaign pledges; he thus commenced investigations of political corruption.

Petitioner investigated such matters as bribery in the Sheriff's Department and embezzlement in the County Clerk's Office and in the school system.[1/] These investigations primarily focused on the friends, associates, and political allies of Judges Scott and Kidwell, as well as other members of the Blanton political organization, and, most significantly,

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1/ These investigations ultimately bore substantial fruit. For example, the investigation of the Anderson County Sheriff's Department resulted in the arrest of Sheriff Dennis Trotter and several other associates of Judge Scott. They were charged in the United States District Court for the Eastern District of Tennessee with various felony offenses. All of them pleaded guilty.

included investigations of Judge Scott's and Chancellor Kidwell's own legal and ethical violations.

Judge Scott's reaction to Petitioner's investigations of himself, his friends, and his associates was swift and intense. Thus, on or about October 10, 1979, Judge Scott warned Petitioner's principal assistant, "I can put you in jail." Less than a week later, Judge Scott made good on his threat. On October 14, 1979, he found both Petitioner and his assistant in contempt and jailed them for failure to obey a court order. Thus began a series of contempt citations and disciplinary complaints against Petitioner and other members of his office, actions that were the forerunners of the disciplinary proceedings that are the subject of this case.

B. Procedural History of This Case

This case commenced on April 18, 1985, when Judge Scott filed a complaint against Petitioner with Respondent. On August 19, 1985, Respondent filed a Petition for Discipline, App. O, against Petitioner alleging, inter alia, that Petitioner had been found guilty of contempt of court with regard to Judge Scott on a number of occasions in the previous six years and that he had made four public, post-trial, out-of-court comments critical of Judge Scott during the same period. The Petition further alleged that Petitioner was in violation of no less than ten different Disciplinary Rules.

Petitioner filed his Answer, App. N, to the Petition for Discipline on September 6, 1985, objecting to its overall vagueness, responding to the specific allegations as best he could, and denying violation of any Disciplinary

Rule. Petitioner filed an Amended Answer, App. P, on September 12, 1985, raising additional objections to the charges contained in the Petition, including his contention that he had:

> suffered prejudice from the resurrecting of old complaints dating back to 1976 in that he has relied to his detriment on the action and inactions of the [Respondent Disciplinary] Board and cannot find records, notes and witnesses to litigate these issues as due process requires.

Id. at 2. Annexed to this amended answer were a series of letters from Respondent informing Petitioner of the dismissal of previously filed Disciplinary Petitions.

Petitioner's case was heard by a Panel of three local attorneys. On April 8, 1987, after taking testimony from a single witness -- Judge Scott -- the Panel filed its Findings. App. G. Although the Panel did not find Petitioner to be in violation of any of the ten Disciplinary Rules alleged to have been violated, it

did conclude that Petitioner was "guilty of a pattern of behavior (contempt of court) which is violative of the Disciplinary Rules" id. at 11 (emphasis added), and recommended that Petitioner be suspended from the practice of law for 180 days.

Shortly after the Panel entered its Findings, Petitioner learned that at least two of the Panel members had cases pending before Judge Scott at the same time they were deliberating on the charges against Petitioner, cases in which the Panel members were seeking approximately $2.3 million in damages on behalf of their clients.

Petitioner promptly moved the Panel to vacate its decision and to have the Panel members disclose additional information about their manifest "conflict of interest." App. H. Petitioner summarized his contention regarding the apparent bias of

the Panel members during a hearing held on his motion, viz.:

> [I]t's just wrong [for t]he three of you distinguished gentlemen to be writing sanctimonious opinions about my ethics while sitting here on $2.3 million worth of [cases before Judge Scott] the only complaint against me.

App. I at 36. The Panel members saw nothing wrong with their conduct, however, and thus denied Petitioner's motion. App. J.

Petitioner filed a timely notice of appeal, requesting review of the Panel's procedures and decision. App. K. On December 15, 1987, a "de novo" hearing was held by Chancellor Inman, who had been specially designated to hear the matter by the Tennessee Supreme Court. Chancellor Inman had previously castigated Petitioner for what he characterized as Petitioner's "appalling" and "provo[cative]" behavior.

On December 18, 1987, less than 72 hours after Chancellor Inman had held the de novo hearing and had received a

voluminous record consisting of several thousand pages of transcripts and exhibits, he issued a "Memorandum Opinion," App. F, in which he "adopted" the Panel's Findings, affirmed its Judgment without reservation, and endorsed its recommendation for a six month suspension of Petitioner's law license. Chancellor Inman: (1) rejected Petitioner's contention that the previously adjudicated and dismissed disciplinary charges were foreclosed from reconsideration by the principle res judicata; (2) held that Petitioner's "public utterances ... which are critical of the court ... are simply not privileged" by the First Amendment; and (3) asserted that the allegations of conflict of interest asserted against members of the Panel were irrelevant because although

> the evidence concerning this issue is not very satisfactory ... it is not [sic] believed that the fact that one of the members of the

> Panel may have had cases pending in the complaining witnesses court is not believed [to be] a disqualifying factor.

Id. at 2-3.

Petitioner's appeal to the Tennessee Supreme Court followed.

## V. REASONS FOR GRANTING THE WRIT

There are two fundamental reasons why this Court should grant a writ of certiorari in this case. First, this Court should grant certiorari in this case because the issues raised are both novel and important. Second, certiorari should be granted in order to prevent a gross miscarriage of justice.

### A. The Issues Presented in this Petition for Certiorari Are Both Novel and Important

#### 1. The Issues Raised Have Never Been Decided By This Court

Petitioner's argument focuses on the violation his right to procedural due pro-

cess by the manner in which proceedings were conducted against him by and before the Panel, the Chancellor, and the Tennessee Supreme Court.2/

Petitioner submits that the manner in which those proceedings were conducted, and the unprecedented sanction imposed on him, implicated the Fourteenth Amendment's protection of the right to due process in seven distinct ways. Thus, seven issues are raised by this Petition. Moreover, the facts of this case make these issues unique, important, and troubling ones, issues that have never been resolved by this Court. These questions range far "beyond the [merely] academic or episodic," Rice v. Sioux City Cemetery,

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2/ Respondent has never disputed Petitioner's assertion that he had a uncontested property right in his office, thus entitling him to procedural due process. See generally, Connick v. Myers, 461 U.S. 138 (1963); Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979); Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

349 U.S. 70, 74 (1955), and thus militate in favor the Court granting the petition for a writ of certiorari. The issues presented in this case thus make it far from a typical attorney disciplinary proceeding.

First, unlike the typical attorney disciplinary case, which focuses on the behavior of the attorney, this case turns on the errors and malfeasance of those who sat in judgment on Petitioner, which resulted in variegated violations of Petitioner's right to procedural due process.

Second, unlike the common attorney disciplinary case, Petitioner's case involves the misuse of attorney disciplinary procedures against a public official.

Third, unlike the common disciplinary proceeding, this case involves the disinterrment of already-resolved disciplinary complaints filed over a six year period by or at the instance of Judge

Scott and thus involves concerns addressed by the Fifth Amendment's Double Jeopardy Clause, the statute of limitations, and the doctrine of res judicata.

Fourth, unlike the ordinary disciplinary case, in which an attorney is given a standardized sanction, such as a reprimand, a six-month probation, or a one-year suspension, the sanction meted out to Petitioner in this case is wholly unprecedented, in that he has been put on probation not for terms of weeks, months, or years, but rather for the remainder of his term in elected office.

### 2. The Issues Raised Have Significance for All Administrative Proceedings, Not Just Attorney Discipline Cases

Although this case most narrowly concerns the deprivation of Petitioner's constitutional rights in an attorney disciplinary proceeding, the issues

presented in his case transcend the narrow bounds of attorney discipline cases; these issues are common to state and federal administrative proceedings of all kinds. Resultantly, if this Court grants certiorari in this case, it will have an opportunity to clarify due process standards for all types of administrative proceedings, both state and federal.

### 3. The Traditional Deference Given to State Bar Disciplinary Proceedings Is Not Warranted Here

At first glance, this case seems to till well-plowed ground. In addition, Petitioner well understands that this Court has traditionally given state courts discretion in the establishment and application of standards of professional conduct to be observed by members of their bars.[3/] Notwithstanding such deference,

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3/ See, e.g., Law Students Civil Rights Research (continued...)

however, this Court has not hesitated to carefully scrutinize state bar policies and procedures, and the actions of state courts in enforcing such procedures, whenever such activities have threatened to trench on fundamental rights and liberties guaranteed by the Fourteenth Amendment.

Long ago this Court held that an attorney's right to practice his profession is not a mere matter of grace or favor revocable at whim. Ex parte Garland, 71 U.S. (4 Wall.) 333 (1866). This Court has accordingly emphasized that "lawyers enjoy first-class citizenship," Spevack v. Klein, 385 U.S. 511, 516 (1967), and has cautioned that "the power

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3/(...continued)
Council, Inc. v. Wadmond, 401 U.S. 154 (1971); Konigsberg v. State Bar of California, 353 U.S. 252, 273 (1967); Wood v. Georgia, 370 U.S. 375, 383 (1962); Theard v. United States, 354 U.S. 278, 281 (1957); Selling v. Radford, 243 U.S. 46, 50-51 (1917). See also Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423 (1982).

of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights." Johnson v. Avery, 393 U.S. 483, 490 n.11 (1969). Significantly, this Court has been most sensitive in protecting the rights of attorneys where, as here, the action of a state disciplinary board "impinge[s] upon the freedom of political expression or association," Konigsberg, supra, 353 U.S. at 273, or "contravenes the Due Process or Equal Protection Clause of the Fourteenth Amendment." Schware v. Board of Bar Examiners of State of New Mexico, 353 U.S. 232, 238-39 (1967).4/

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4/ See In re Ruffalo, 390 U.S. 544, 550 (1968); Willner v. Committee on Character and Fitness, 373 U.S. 96, 102 (1963).

## B. This Court Should Grant Certiorari in Order to Prevent a Gross Miscarriage of Justice

This Court should grant certiorari in this case because this case presents one of the truly infrequent cases where such action is needed to correct a manifestly gross miscarriage of justice, an error which directly affects not only Petitioner, but the citizens of Anderson County as well. Arizona v. Maricopa County Medical Society, 457 U.S. 332, 336 (1982); New York Transit Authority v. Beazer, 440 U.S. 568, 571 (1979).5/

This Court should grant a writ of certiorari because such a glaring abridgement of constitutional rights would not have been possible but for the fact that the decisions are completely contrary to the record and are, in fact, "so

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5/ See also Thompson v. City of Louisville, 362 U.S. 199 (1960); Washington v. United States, 357 U.S. 348 (1958).

totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment." Garner v. Louisiana, 368 U.S. 157, 163 (1961). See also Memphis v. Greene, 451 U.S. 100, 102 (1981); Thompson v. City of Louisville, supra; Mobil Oil Co. v. Federal Power Comm'n, 417 U.S. 282, 292 (1974); Washington v. United States, 357 U.S. 348 (1958).

This Court should also assert jurisdiction in this case because in rejecting the claims raised by Petitioner concerning the denial of his constitutional rights, the Supreme Court of Tennessee chose to completely ignore the precedents of this Court.6/

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6/ See, e.g., Hudson v. Louisiana, 450 U.S. 40, 42 (1981); Burlington v. Missouri, 451 U.S. 430, 432 (1981); Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 371-72 (1974); William E. Arnold Co. v. Carpenters Dist. Council, 417 U.S. 12, 14 (1974); Hankerson v. North Carolina, 432 U.S. 233, 240 (1977); Oregon v. Mathiason, 429 U.S. 492 (1977).

As noted above in Section II, "Jurisdiction", the issues raised in the instant Petition were put before -- and ignored by -- the courts below. Most significantly, in his briefs to the Tennessee Supreme Court and at oral argument before that court, Petitioner consistently asserted that his right to due process guaranteed by the U.S. Constitution had been violated. He cited decisions from this Court and from other federal courts that spoke to important federal issues thus raised before that court. App. M at 16-44. This painstaking effort was for nought, however, because the Tennessee Supreme Court dispatched all of these constitutional arguments in four pages, in which it cited only three opinions as precedents, none of which were from federal courts and none of which interpreted or applied federal constitutional law. App. A at 15-18.

The Tennessee Supreme Court paid no attention to the federal constitutional questions raised by Petitioner with regard to each issue. Moreover, that court completely avoided any discussion of two of the issues raised, No. 3 (violation of a non-offense, i.e., a "pattern" of misbehavior) and No. 5 (resurrection of previously dismissed disciplinary charges), and summarily dispatched three other issues raised.7/

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7/ See App. A at 15-18. Thus, on the question of whether the Petition for Discipline had been clear enough to give Petitioner constitutionally adequate notice of the charges against him (Issue No. 2), that court blandly surmised that it was clear enough because his answers to the questions subsequently put to him by the Disciplinary Counsel "[did] not indicate any misunderstanding by him as to what he was being charged with." Id. at 17.

Similarly, on the issue of whether Petitioner had been denied due process because the Panel was biased against him and because Chancellor Inman had likewise prejudged his case, (Issue No. 1), the Tennessee Supreme Court casually noted that the "record fails to support these claims" and that, in any event, any bias or prejudice below was completely immaterial because such "would be cured by our de novo review 'upon the transcript of record ...'". Id. at 16. But the

(continued...)

Petitioner submits that he deserved better. He contends that the Tennessee Supreme Court's offhand and cursory treatment of his arguments, far from "cur[ing]", App. A. at 16, the constitutional errors made by the Panel and the Chancellor, affirmed and thus recapitulated and compounded those mistakes. As if that were not enough, in devising a non-judicial sanction, the Tennessee Supreme Court made its own contribution to the lower courts' deprivation of Petitioner's right to due process.

The Tennessee Supreme Court's most fundamental failing was not that it misapprehended and improperly decided the

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7/(...continued)
Tennessee Supreme Court never reflected on the fact that this record was created by biased and prejudiced decisionmakers below.

Finally, on the issue of whether due process entitled Petitioner to a true judicial determination and whether he, in fact, received such appropriate determinations, (Issue No. 4), the Tennessee Supreme Court simply pronounced "[t]he record simply fails to support [Petitioner's] contentions." Id. at 18.

federal questions raised by Petitioner, but rather that it did not rule on those issues at all.

The Tennessee Supreme Court's refusal to consider the federal rights claimed by Petitioner cannot be permitted to work a repudiation of those rights. To countenance such resistance would not only effect an injustice in this particular case but would encourage similar efforts at nullification through omission by other recalcitrant courts.

C. Discussion

In the ensuing discussion we will summarize how Petitioner's due process rights were violated in seven separate ways. Each one of these errors and omissions make up a patent violation of "fundamental fairness", fairness that is the heart of due process and "ordered liberty." Benton v. Maryland, 395 U.S. 784 (1969); see Palko v. Connecticut, 302

U.S. 319 (1937). Viewed separately, each one of these violations of due process establishes that the Tennessee Supreme Court's decision ought to be vacated; viewed together, these seven violations compel that result.

### 1. The Panel and the Chancellor Were Tainted With, at Minimum, the Appearance of Bias and Prejudice

A hallmark of our judicial system is bias-free decision-making. Due process requires that every judicial or quasi-judicial proceeding, whether civil or criminal, shall be conducted by neutral, detached, and impartial triers of fact. What the Panel, the Chancellor, and the Tennessee Supreme Court failed to appreciate is that this principle applies to administrative proceedings such as those brought by Respondent.

This Court has held that "[a] fair trial in a fair tribunal is a basic

requirement of Due Process." In re Murchison, 349 U.S. 133, 136 (1955).[8] Thus, "the right to an impartial decision-maker is required by due process" in every case. Arnett v. Kennedy, 416 U.S. 134, 197 (1974) (White, J., concurring in part and dissenting in part). This requirement applies to administrative agencies and hearing officers as well as judges. Withrow v. Larkin, 421 U.S. 35, 46 (1975); Gibson v. Berryhill, 411 U.S. 564, 578-79 (1973); American Cyanamid Co. v. Federal Trade Comm'n, 363 F.2d 757, 767 (6th Cir. 1966).[9] Although this Court has never ruled on the applicability of these principles to attorney disciplinary cases, at least one state supreme court has held that due process requires that these

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8/ See also Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986).

9/ See Friedman v. Rogers, 440 U.S. 1, 17-20 (1979); Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971); K. Davis, Administrative Law, § 19.1 et seq. (2d. ed. 1980).

principles must be honored in state-sanctioned administrative licensing proceedings, such as lawyer disciplinary proceedings, positing that whenever an administrative board member has an interest, financial or otherwise, in a proceeding, the member must recuse himself. In re Heirich, 140 N.E.2d 825, 838-39 (Ill. 1956). 10/

Decisionmakers who are biased or prejudiced for or against a particular party or have an interest in the outcome of the adjudication are constitutionally unacceptable under the Due Process Clause. Because "the appearance of evenhanded justice ... is at the core of due process", Mayberry v. Pennsylvania, 400 U.S. 455, 469 (1971) (Harlan, J., concurring), this Court has emphasized

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10/ See also Board of Selectmen v. Alcoholic Beverages, 369 N.E.2d 1011, 1016 (Mass. 1977); Chicago M. St. P. & Pac. R. v. Washington St. Com'n, 557 P.2d 307 (Wash. 1977), Boughan v. Board of Engineering Examiners, 611 P.2d 670 (Or. 1980).

that even the appearance of a pecuniary interest in legal or administrative proceedings should prompt an adjudicator to disqualify himself. Gibson v. Berryhill, supra, 441 U.S. at 579, (citing Tumey v. Ohio 273 U.S. 510 (1927). Further, this Court has emphasized that the apparent financial stake need not be direct or positive.11/

The dispute which underlies this case involved Judge Scott on one hand and

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11/ See also Morrissey v. Brewer, 408 U.S. 471, 485-86 (1972); Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

A Sixth Circuit decision is instructive on this score. Discussing due process in the context of an administrative adjudication, the Sixth Circuit stated:

> It is fundamental that both unfairness and the appearance of unfairness should be avoided. Wherever there may be reasonable suspicion of unfairness, it is best to disqualify.

American Cyanamid Co. v. F.T.C., supra, 363 F.2d at 767 (emphasis added). See also Roberts v. Bailar, 625 F.2d 125, 129-130 (6th Cir. 1980); Hall v. Small Business Administration, 695 F.2d 175 (5th Cir. 1983).

Petitioner on the other -- and no one else. Judge Scott was not just an occasional antagonist of Petitioner; he was his unceasing nemesis, who had cited Petitioner for contempt on numerous occasions and who had filed complaints with Respondent against Petitioner nearly as often.

Under these circumstances, Petitioner was entitled to procedural due process that would insure: (1) that the Panel was free of bias and even the appearance of interest; (2) that Chancellor Inman was free of both actual and apparent prejudice; (3) that both the Panel and the Chancellor would disclose information tending to show an appearance or actual prejudice or bias; and (4) if appropriate, Panel members and the Chancellor would disqualify themselves sua sponte.

Denial of any one of these entitlements would violate due process. As we

shall demonstrate, Petitioner was denied all four of them.

a. Bias of the Panel

Judge Scott was as much the focus of the hearing as Petitioner. First, he initiated all of the charges against Petitioner which were being heard. Second, far from simply lodging a complaint, he was the only witness who testified at the proceeding. Third, as a witness, Judge Scott did more than testify about facts; instead, he was a protagonist who made a personal appeal to the Board against Petitioner during his so-called testimony.

The vehemence of Judge Scott's views were particularly important because, unbeknownst to Petitioner, at least two of the three attorneys on the Panel (or their firms) had civil suits pending before Judge Scott at the same time they were receiving testimony, weighing evidence, and sitting in judgment on Petitioner.

Significantly, none of the Panel members disclosed this clear appearance of interest, and none voluntarily disqualified themselves, either before or even after these facts were brought to light. Decisionmakers sitting in a judicial position in a proceeding where they have cases pending before the complainant (a judge) unquestionably present the appearance of interest. But no Panel member brought these matters to the attention of the parties or their counsel.

Petitioner did not learn of these matters until after the Panel had rendered its decision. When he discovered the information, Petitioner promptly moved to have the Panel's decision vacated. Significantly, none of the Panel members denied having cases pending before Judge Scott, and none disputed Petitioner's assertion that these cases were worth approximately $2.3 million. Nevertheless,

the Panel members opined that they saw nothing wrong with their simultaneous litigation of cases before Judge Scott and what amounted to his prosecution of a case before them, and thus rebuffed Petitioner's motion to vacate their Findings. App. J at 3-4.

Canon 3(C) of the Code of Judicial Conduct, incorporated as Rule 10 of the Rules of the Tennessee Supreme Court, Tenn. Code Ann. (1987), provides, inter alia, that a judge should disqualify himself in any proceeding (1) "in which his impartiality might reasonably be questioned," or (2) where "he knows that he, individually, or as a fiduciary ... has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." (Emphasis added).

These principles governing judicial conduct underscore Petitioner's contention that Panel was tainted by at least the appearance of interest and the appearance of impropriety. Given the fact that a majority of the members of the Panel had cases pending before Judge Scott, and given the great importance Judge Scott placed on having Petitioner disciplined, one must wonder whether anything weighed on the minds of the Panel members other than the evidence before them, i.e., whether their own fortunes and reputations, or at least those of their clients, also weighed in the balance.12/ It

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12/ In a more general vein, the appearance of interest also ran to maintaining their reputations as effective litigators before Judge Scott and with present and future clients. This, too, is a recognized "interest" for, as the Illinois Supreme Court has explained, the interest for the appearance of which would be disqualifying need not be pecuniary: "It need only be an interest which can be viewed as having a potentially debilitating effect on the impartiality of the decision-maker." International Harvester Company v. Bowling, 391 N.E.2d 165, 171 (Ill. 1979).

certainly appears likely that Panel members could have made two reasonable assumptions: (1) that if they ruled in favor of Petitioner, they might jeopardize their interests in the cases then pending before Judge Scott; or (2) that if they ruled in favor of Judge Scott, i.e., against Petitioner, Judge Scott might return the favor, or, at least, they might find that he would not be antagonistic to them regarding the cases they had pending before him and even might be favorable to them in these and other cases.13/

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13/ Petitioner was entitled to a de novo review of this issue (as well as all others) regarding the interest and nondisclosure when his case came before Chancellor Inman. But, the Chancellor compounded the violation of Petitioner's due process rights. He did not conduct a de novo hearing and he did not independently scrutinize these most serious (and documented) claims. Instead, he rejected Petitioner's argument in a terse and unelucidating statement:

> Evidence concerning this issue [interest] is not very satisfactory -- one of the [Panel] members may have had cases pending in [Judge Scott's court] but it is not

(continued...)

b. Prejudice of the Chancellor

There are distinct and additional reasons why Chancellor Inman should have disqualified himself sua sponte. The Chancellor was not only familiar with the ongoing conflict between Petitioner and Judge Scott; he had already formed and expressed opinions about the merits of their continuing dispute. Under these

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13/(...continued)
believed that this is a disqualifying factor.

App. F at 2-3 (emphasis added).

Chancellor Inman thus made no inquiry on his own into the interest, or appearance of interest, of the Panel members. Nor did he explicate the basis for his "belie[f]" that interest was not a "disqualifying factor". In fact, he did not even recognize that the issues for his review also included whether there was an appearance of interest and whether the Panel members had an obligation to disclose information relating to the appearance of interest. The Chancellor also appeared completely uninterested in the fact that not one, but at least two and, indeed, possibly three, Panel members had cases before Judge Scott's Court. Chancellor Inman never undertook to explore these fundamental questions and, so, perpetuated the violation of Petitioner's due process rights.

circumstances he should have disqualified himself on his own motion.

Canon 3(C)(1) of the Code of Judicial Conduct requires a judge to disqualify himself where "his impartiality might reasonably be questioned" or where he might have "a personal bias or prejudice concerning a party ... ." (Emphasis added). The Rule establishes, and applicable case law supports, the view that when a judge finds that such conditions conceivably might obtain he has an ethical obligation not only to view with favor a motion for recusal but to disqualify himself sua sponte.

On May 31, 1983, while serving as Presiding Judge of the Court of the Judiciary, Chancellor Inman wrote a letter to Petitioner in response to a complaint Petitioner had filed with that Court about Judge Scott. That letter revealed that Chancellor Inman had already

fixed his opinions about the dispute between Petitioner and Judge Scott. Among other things, that letter disclosed that Chancellor Inman was "utterly appalled" by Petitioner's conflict with Judge Scott, a conflict which Chancellor had already divined was "provo[ked]" by Petitioner. Obviously, by the time he was called upon to sit on Petitioner's case in 1987, Chancellor Inman had lost at least the appearance of, and perhaps even actual, impartiality.14/ Inasmuch as these statements show that Chancellor Inman had formed focused opinions adverse to

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14/ The issue is one of appearances: in Roberts v. Bailar, supra, the Sixth Circuit held that a distinguished federal judge should have recused himself sua sponte merely because he stated that the defendant in a sex discrimination case "is an honorable man and I know that he would never intentionally discriminate against anybody." 625 F.2d at 127. Because that statement, like those of Chancellor Inman, showed a reasonable factual basis for doubting the judge's impartiality, he was deemed to be under a duty to recuse himself. Id. See also School District of Kansas City Missouri v. State of Missouri, 438 F. Supp. 830 (W.D.Mo. 1977).

Petitioner before he sat on Petitioner's case, it is respectfully submitted that due process required his sua sponte recusal.

The Tennessee Supreme Court was completely unreceptive to these arguments, noting without further elaboration that Petitioner "has made allegations of actual and apparent bias on the part of the triers of fact, but the record fails to support these claims." App. A at 9. The court also voiced its view that any prejudice below was immaterial because "any interest or bias on the part of the Panel" would have been cured by the Chancellor's de novo review, and any "any interest or bias on the part of the Chancellor would be cured by our de novo review" of the record. Id. But this is vacuous reasoning. The record clearly shows that the "triers of fact" were biased and prejudiced, or at least

appeared to be. No amount of appellate review of the factual record could remove this factual defect, particularly where the "record" relied on was created by those same decisionmakers.

### 2. Petitioner Did Not Receive Constitutionally Adequate Notice of the Charges Against Him

The minimal requirements of due process are "notice and the opportunity to be heard." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). As this Court has frequently observed, where notice is inadequate due process is abridged. See, e.g., Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 654-55 (1985); Willner v. Committee on Character and Fitness, 373 U.S. 96, 105 (1963); Selling v. Radford, 243 U.S. 46, 50-51 (1917). Respondent's Petition for Discipline failed to meet the minimal standards of adequate notice and

thus deprived Petitioner of the due process that was owed him. The Petition was not only woefully lacking in the requisite clarity and specificity, but was so contradictory and vague as to be fundamentally unfair. As a result, those proceedings were constitutionally tainted from their inception.

The Tennessee Supreme Court rejected these arguments, tersely observing that, despite the manifest stupefaction of the Petition, Petitioner had no cause to complain. The Court reasoned that the Petition must have been clear enough because Petitioner did not appear to be sufficiently confused when, during the evidentiary hearing before the Panel, Respondent's counsel asked him questions about the various allegations and charges against him. According to that court, Petitioner's ability to answer those questions showed that he was not so

confused to have deserved a less baffling recitation of the charges against him. In other words, the efforts of Respondent's counsel to clarify the Petition cured the Petition's defects. Even assuming, arguendo, that this had been so, the minimal requirements of due process would still not have been satisfied because the concept of notice means that a person brought before a tribunal must be able to understand what he is charged with in order to answer the complaint and to prepare his defense. The utterly perplexing Petition in this case was facially incapable of providing Petitioner with such adequate prior notice.

### 3. Petitioner Was Convicted of Committing a Non-offense, that is, a "Pattern of Behavior"

Due process requires that a person can only be convicted of violation of a pre-existing law or regulation, not one made

up after the fact. See United States Constitution, Art. I, Section 9, cl. 3 and Art. I, Section 10, cl. 1. Due process also requires that a person be convicted of a specific substantive charge, with clearly defined elements. See Russell v. United States, 369 U.S. 749 (1962); United States v. Debrow, 346 U.S. 374 (1953); United States v. Simmons, 96 U.S. 360 (1878).

In this case, Petitioner was found "guilty" of a non-offense, of having committed a "pattern" of misconduct. Significantly, though, the applicable Disciplinary Rules do not contain a single reference to a "pattern" of misbehavior or a "pattern" of disrespect, or a "pattern" of contempts. Thus, both the Panel and the Chancellor labored under the mistaken impression that a "pattern" of misbehavior was actually a substantive offense under the Disciplinary Rules and, so believing,

found that Petitioner had engaged in conduct that amounted to such a pattern. They were wrong, both as a matter of law and as a matter of fact.

The Panel and the Chancellor apparently imported the "pattern" offense from the American Bar Association's Model Standards for Imposing Lawyer Discipline ("Model Standards"). Significantly, neither the Tennessee Supreme Court nor the Tennessee Legislature has ever promulgated or adopted these standards. Moreover, the Model Standards, by their express terms, are applicable only after an attorney has been found to have violated a Disciplinary Rule, and cannot be used as a surrogate for the rules themselves. Thus, Section 9.21 of the Model Standards refers to "Aggravating Factors including ... a pattern of misconduct ... ." Therefore, although a pattern of misbehavior may be properly part of the calculus used to

determine the extent of the sanction to be imposed, if any, it is not a substantive standard against which a lawyer's behavior can be measured.

The Panel erroneously relied on a standard that has not been promulgated or recognized as grounds for discipline in Tennessee or any other state and a standard that cannot be used as a substantive measure of an attorney's behavior. The Panel converted a sentencing factor into a substantive standard of behavior. This mistake was repeated and affirmed by Chancellor Inman. As a consequence, Petitioner was found to have violated a Rule that did not exist, in clear derogation of due process.

The Tennessee Supreme Court completely refused, without explanation, to address these arguments.

### 4. Petitioner Was Denied a Proper Judicial Determination by Both the Panel and the Chancellor

Petitioner's right to due process was also violated by the failure of the Panel and the Chancellor to provide him with a true judicial determination, comprehending, among other things, findings of fact and conclusions of law that were specific, unambiguous, and based on the record.

The Panel's Findings and Chancellor Inman's memoranda and judgment are internally contradictory, contradict each other, and are flawed by major factual and legal errors. To cite but one glaring example, the Panel found Petitioner "guilty" of having been found in contempt of court by Judge Scott in the Culbertson case, mistakenly believing that case was heard and that contempt citation entered in April 1985. App. G at 8. In fact, as Respondent's Petition for Discipline correctly stated, the Culbertson contempt

did not occur in 1985, but six years earlier, in 1979. This egregious mistake was compounded, because, as discussed above, it led the Panel to mistakenly divine a "pattern" between the 1983 grand jury contempt and what it believed to be the "1985" Culbertson contempt. App. G at 8. Moreover, to make matters worse, this 1979 incident had been the basis for a previous disciplinary complaint by Judge Scott, a complaint which Respondent investigated, adjudicated, and dismissed in 1979.

Although Petitioner extensively disputed the accuracy of the Panel's findings of fact and law, the Chancellor, without further elaboration, curtly stated: "The statements of findings of fact by the Panel are not seriously controverted." This was simply not supported by the record. Chancellor Inman thus compounded the Panel's errors

insofar as he: (1) simply refused to note, let alone correct, the Panel's mistakes (e.g., the Panel's mistaken notion that the Culbertson contempt occurred in 1985 rather than in 1979); (2) took into account pre-1983 incidents that even the Panel had agreed would not be appropriate to consider; (3) condemned Petitioner for public comments that were critical of Judge Scott that even the Panel had conceded were protected by the First Amendment; and (4) did all of the above without explanation, without specification, and by simply adopting the allegations made in the Petition as conclusions of law.15/ Respondent did not

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15/ This Court has condemned conclusory determinations of constitutional issues made in a fashion similar to those by Chancellor Inman. In Wood v. Georgia, 370 U.S. 375 (1962), this Court proscribed a determination by the Georgia Court of Appeals that a defendant's statements would present the requisite "clear and present danger" to the administration of justice, where there was no evidence of record to support such a conclusion and where the appellate court did not acknowledge

(continued...)

deny that Petitioner was entitled to a true judicial determination. Most significantly, Respondent did not dispute, and thereby implicitly conceded, Petitioner's arguments: that the Panel and the Chancellor utterly failed to provide him with such a determination; that the Panel's and the Chancellor's opinions were vague and contained unexplained and unreconcilable factual and legal contradictions; that Petitioner was convicted of no specific offense; and that the Panel and the Chancellor never made a specific

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15/(...continued)
"even an awareness" of the applicable standards and did not conduct a review based on such standards. See 370 U.S. at 387-389. There are striking parallels between that case and this one: in both Wood and Petitioner's case the reviewing court "simply adopted as conclusions of law the allegations made in the contempt citation", 370 U.S. at 387; and, in both cases "the court did not indicate in any manner how ..." the behavior inquired into was proscribed by applicable rules. Id. Finally, in both Wood and this case, the record is effectively barren of findings which support the court's legal conclusions. See id.

reference to which of the Disciplinary Rules had been violated by Petitioner.

Notwithstanding these concessions by Respondent, the Tennessee Supreme Court dispatched Petitioner's arguments with a single, talismanic phrase: the "record simply fails to support these contentions." App. A at 18.

5. **Prior Allegations -- Which Had Been Adjudicated in Petitioner's Favor -- Were Resurrected and Improperly Used Against Him by the Panel and the Chancellor**

Due process was violated in yet another way when past acts and allegations about Petitioner were improperly used by the Panel and Chancellor Inman. One of the law's most honored and settled principles is that when a person's present conduct comes under scrutiny, his past transgressions cannot be held against him except under specific and restricted conditions. Indisputable too is the

principle that a person cannot be put to the task of repeatedly defending himself against past allegations. These principles are reflected in the Fifth Amendment's proscription against double jeopardy, in the policy underlying the statute of limitations, and in the presumption of innocence in criminal cases that is a "basic component" of the Fourteenth Amendment's guarantee of the right to fair trial. Estelle v. Williams, 425 U.S. 501 (1976). These principles were violated in Petitioner's case.

The application of these principles here means that if prior allegations of misconduct or disciplinary complaints lodged against Petitioner had been rejected by Respondent, or if no charges had been filed by Respondent, or if Petitioner had been exonerated of any complaints or disciplinary petitions which had been filed, then such previous

charges could be not considered in determining Petitioner's substantive responsibility for disciplinary violations charged in the instant Petition for Discipline.

In this case, the Petition alleged eight acts of prior misbehavior. In seven of these eight incidents, either the First Amendment protected Petitioner from any proceedings against him, or no action had been taken by Respondent, or a disciplinary complaint or petition had been dismissed. Only a single incident was properly before the Panel and Chancellor Inman. The other incidents, obviously influential and inculpatory in the minds of the Panel, the Chancellor, and, no doubt, the Tennessee Supreme Court, should never have been brought to their attention. Because these incidents were presented and considered, however,

Petitioner's due process rights were violated.

Inasmuch as the only conceivably proper use for these prior incidents was with respect to the appropriate sanction to be imposed, it is plain that the Disciplinary Counsel, the Panel, and the Chancellor (and the Tennessee Supreme Court) went far beyond the bounds of law in using these incidents. Also, because the Petition did, in fact, refer to prior incidents that should never have been brought to the attention of either the Panel or the Chancellor, the proceedings before these bodies were irredeemably tainted from their inception.

The Petition should have contained no reference whatsoever to prior acts because such acts are only to be taken into account at the time of determination of a sanction, and not with respect to substantive guilt. Neither the Panel, the

Chancellor, nor the Tennessee Supreme Court should even have been informed of these other incidents or allegations until after they had made an adjudication of Petitioner's responsibility for the single incident which was properly charged against him.16/

The Tennessee Supreme Court was obviously discomfited by these arguments; it said not a word about them, conceding by its silence the validity of those arguments and the merit to Petitioner's

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16/ This has been made clear by the ABA's Model Standards for Lawyer Discipline, which provide:

> **Prior disciplinary record.** Information regarding prior discipline of a Respondent [lawyer] normally should not be divulged to a Hearing Committee until after there has been a finding of misconduct in the present matter.

Model Standard 8.39. (Emphasis added).

The Commentary to the Model Standards indicates that allegations of prior misbehavior, "should not be used as a substitute for proving the allegations at issue." Id. This is precisely what happened to Petitioner in this case. Accordingly, his right to due process was violated.

claim that consideration of the prior allegations constituted a violation of due process.

### 6. There Was Insufficient Evidence to Find That Petitioner Had Committed Any Violation

As noted above, when previously adjudicated and dismissed incidents are removed from consideration, only one incident remains to make out the "pattern" of misbehavior and disrespectful conduct charged in the Petition. It is respectfully submitted, however, that even if the previously adjudicated incidents could legitimately be grounds for discipline, Petitioner still could not be disciplined on the basis of the "pattern" found in these disparate incidents, because, as discussed above, a "pattern" is not a substantive offense warranting sanctions under the Disciplinary Rules. Furthermore, no evidence was presented and

no proof adduced sufficient to find that Petitioner had violated any of the Disciplinary Rules listed in the Petition.

The Tennessee Supreme Court thought otherwise, finding sufficient evidence to prove that Petitioner had

> violated DR 1-102(a)(5) (conduct that is prejudicial to the administration of justice), and DR 7-106(C)(6) (undignified or discourteous conduct which is degrading to a tribunal).

App. A at 29. That court's subsequent discussion of the evidence reveals, however, that the evidence presented consisted of inadmissable recapitulations of incidents that had been previously considered -- and previously dismissed -- by Respondent. In other words, the proof relied on by the Tennessee Supreme Court proved nothing at all, or at least nothing beyond that court's evident zeal to find some sort of basis for sustaining the decisions below and some sort of basis for visiting sanctions upon Petitioner.

Because, as this Court remarked long ago, professional discipline imposed despite such "infirmity of proof" violates due process, Selling v. Radford, supra, 243 U.S. at 50-51, the Tennessee Supreme Court's decision cannot stand.

### 7. By Tying Petitioner's Disciplinary Sanction to His Remaining Time in His Elected Office, the Tennessee Supreme Court Impermissibly Imposed a Non-Judicial Sanction

The Tennessee Supreme Court's unique sanction breached historic constitutional principles. That court forgot that the "very essence of civil liberty" is that ours is "a government of laws, not men." Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 163 (1803). That court also ignored the lesson taught by this Court more than a hundred years ago:

> that law is something more than mere will exerted as an act of power. It must not be a special rule for particular person or particular case, but ... "the

> general rule ..." so that "every citizen shall hold his life, liberty, prosperity, and immunities under the protection of the general rules which govern society" and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation ... and other similar special, partial and arbitrary exertions of power ... .

Hurtado v. California, 110 U.S. 516, 535-36 (1884) (emphasis added; citations omitted). The Tennessee Supreme Court disregarded the U.S. Constitution in imposing a sanction on Petitioner expressly tied to his unique status as an elected public official, and not to his status as a member of the Tennessee Bar.

In reviewing Petitioner's 180-day suspension the Tennessee Supreme Court increased the sanction. While the court reduced the period of suspension from 180 days to 45 days, it increased the overall period of disciplinary status from 180 days to "the remainder of his term in

office ending August 31, 1990." App. A at 35.

Connecting a penalty for violation of attorney disciplinary rules to his term in elective office is clearly violative of due process. The Tennessee Supreme Court's decision to burden Petitioner through the remaining days of his term in office sends a clear signal both to Petitioner and to the electorate who chose him to be their chief law enforcement officer.

The court's message to Petitioner is unmistakably political: if you conform your conduct to that of other elected officials, principally Judge Scott, you can continue to serve in office; if you do not so conform, at <u>any</u> time during the time remaining in your term of office, "then [your] license to practice law will be automatically suspended for the

remaining 135 days [initially recommended by the Panel]." App. A at 34-35.

The court has also sent a message that shows the essentially political, rather than judicial, character of its decision. By tying Petitioner's disciplinary sanction to his position as an elected official instead of basing that sanction solely on his status as a member of the bar, the court essentially offered him a political deal -- quit office now and all sanctions will be removed. Such missives cannot but impair Petitioner's ability to zealously and faith-fully serve his clients -- the constituents of Anderson County.

As is true in other aspects of Petitioner's case, the Tennessee Supreme Court's notion of a permissible sanction for a person subject to the jurisdiction of an administrative agency has a broad, and an ominous, reach. The Court evi-

dently believes that it can condition eligibility for an office or an occupation upon a person's abandonment of his political creed. This simply cannot be squared with the First Amendment.17/

Singling out Petitioner for discipline with political overtones is tantamount to a judicial bill of attainder, an act which is clearly proscribed by the Constitution.18/ While Petitioner, like any other lawyer, may be disciplined because he is a lawyer, he cannot be sanctioned because he is a District Attorney or because he is an elected public official.

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17/ See, e.g., Konigsberg, supra; Schware, supra; Federal Communications Comm'n v. League of Women Voters of California, 468 U.S. 364 (1984).

18/ See United States v. Lovett, 328 U.S. 303, 315 (1946); United States v. Brown, 381 U.S. 437 (1965); Ex parte Garland, 71 U.S. (4 Wall.) 333 (1866).

## VI. CONCLUSION

For the reasons stated above Petitioner James Nelson Ramsey respectfully prays that this Court grant a writ of certiorari in this case.

DATED: Washington, D.C.
August 21, 1989

Respectfully submitted,
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# APPENDIX

**Exhibit A**

James Nelson RAMSEY,
Petitioner-Appellant,

v.

BOARD OF PROFESSIONAL RESPONSIBILITY OF the SUPREME COURT OF TENNESSEE, Respondent-Appellee.

Supreme Court of Tennessee,
at Knoxville.

April 17, 1989.

James E. Foglesong, Foglesong, Cruz, Shope and Kerr, Knoxville, Roger M. Adelman, Ned I. Miltenberg, Kirkpatrick & Lockhart, Washington, D.C., for petitioner-appellant.

Tennessee Dist. Attys. Conference, Joe Baugh, President, amicus curiae.

William W. Hunt, III, Disciplinary Counsel, Nashville, for respondent-appellee.

OPINION

DROWOTA, Chief Justice.

Appellant, James Nelson Ramsey, the District Attorney General for Anderson County, has appealed the suspension of his law license for one-hundred and eighty (180) days. He raises four basic grounds as to why the Order of Suspension should not stand: (1) jurisdiction, (2) denial of due process, (3) constitutional right to free speech, and (4) the sufficiency of the evidence as a matter of law.

Appellant, a native of Oak Ridge, was in 1972 admitted and licensed by this Court to practice law in Tennessee. In 1978, Appellant ran for and was elected District Attorney General. Appellant contends that "after his election, he was faced with appearing before two judges who allied in political hostility against him."

A complaint was filed against Appellant with the Board of Professional Responsibility on April 18, 1985. A Petition for Discipline was filed by the Board on August 29, 1985. A three-member Hearing Panel of the Board heard this cause on March 16 and 17, 1987. The Hearing Panel filed its Findings and Judgment on April 8, 1987. The Panel stated:

> "[I]t seems appropriate to observe that the issues in this case affect or involve many persons; nevertheless, the operative facts are focused primarily on two persons. The case presents the lengthy and rather sad saga of the relationship between these two persons. One of these persons is the [Appellant], James Nelson Ramsey, a licensed attorney and the duly elected District Attorney General of Anderson County, Tennessee. The other is Judge James B. Scott who likewise is a licensed attorney and the duly elected Judge of the Circuit and Criminal Court of Anderson County....
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> The relationship between the [Appellant] and Judge Scott is complex and it cannot be accurately described with one or even with a few words.

> Suffice it to say that the level of disaffection between them is exceeded only by the level of suspicion which each harbors for the other. The panel feels constrained to point out in this submission that the failure of these two elected officials to work cooperatively is harmful to the administration of the justice in Anderson County and borders on being a public disgrace.
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> The Petition for Discipline alleges multiple acts of contemptuous behavior by the [Appellant], multiple public expressions regarding either the court's adjudications of contempt or the Board of Professional Responsibility's prior adjudication of discipline, and in addition, the Petition charges a pattern of behavior which violates the Disciplinary Rules."

The Panel first addressed the charges of unethical conduct based on the Appellant's public expression to the media. The Panel found "the right of free speech may not be absolute, but it does appear to be broad enough to protect these expressions."

The Panel next addressed the contempt adjudications in 1983, and 1985, and found Appellant's actions were not only contemptuous but were also violative of DR 1-102(A)(5) and DR 7-106(C)(6).1/ The Panel further found Appellant's "conduct since 1979, as alleged in the Petition and established by the evidence, shows a pattern of disrespect for the Court. Every instance is different but they all contain a common thread of indifference toward and disrespect for the Court." The Panel adjudged that Appellant "should be suspended from the practice of law for a period of one-hundred and eighty (180) days." The Panel concluded its findings and judgment by stating: "All concerned

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1/ "DR 1-102(A)(5) (A lawyer shall not engage in conduct that is prejudicial to the administration of justice)," and "DR 7-106(C)(6) (In appearing in his professional capacity before a tribunal, a lawyer shall not engage in undignified or discourteous conduct which is degrading to a tribunal)."

parties should examine their own conscience and strive to put an end to the hostilities and suspicion which appears to permeate the criminal justice system in Anderson County."

On July 1, 1987, the Appellant filed a Petition for Writ of Certiorari in the Chancery Court of Anderson County. A special judge was designated by this Court on July 29, to hear this cause. On December 15, 1987, a de novo review of the Panel's determination was held by Chancellor William H. Inman. The Chancellor abstained from the jurisdiction issue, finding that the Supreme Court "has the exclusive prerogative to determine the constitutionality of its Rules." The Chancellor found no merit in Appellant's due process argument as it related to the Hearing Panel members allegedly having interests adverse to Appellant. With

reference to Appellant's argument that his right to free speech guaranteed by the Tennessee and United States Constitutions was violated--the Chancellor found Appellant's "pronouncements are simply not privileged." The Chancellor adopted the Hearing Panel's findings of fact and affirmed the Panel's suspension of Appellant's law license for 180 days.

Pursuant to Rule 9, Section 1.3 Appellant appealed the Chancellor's decision to this Court.

## I
## JURISDICTION

Appellant contends that, as an elected public official, neither Rule 8 nor Rule 9 of this Court's rules can be applied to him.[2/] To do so, he submits,

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2/ Rule 8, Rules of the Supreme Court, is (continued...)

would violate both the Tennessee Constitution and the United States Constitution. Appellant avers that in suspending him the Disciplinary Board, and presumably the Chancery Court, exceeded its statutory jurisdiction and violated the constitutional principal of separation of powers.

Appellant argues that under the Tennessee Constitution, judges and district attorneys are treated identically and Article VI, Section 6 ordains a single and exclusive method of removal--impeachment by the Legislature. We agree that the exclusive method of removal from office for judges and district attorneys is by impeachment. However, this does not

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2/(...continued)
entitled "Code of Professional Responsibility."
Rule 9, Rules of the Supreme Court, is entitled "Disciplinary Enforcement."

mean that district attorneys and judges are not subject to discipline. The right of this Court to establish Rules of practice and procedure for disciplining attorneys is clear. Petition of Tennessee Bar Ass'n, 539 S.W.2d 805, 810 (Tenn. 1976). Rule 9, Section 1.1, Rules of the Supreme Court, states that "any attorney admitted to practice law in this State...is subject to the disciplinary jurisdiction of the Supreme Court, the Board, the hearing committees, hereinafter established, and the Circuit and Chancery Court."

This Court has inherent, original and exclusive jurisdiction pertaining to the licensing of attorneys. Belmont v. Board of Law Examiners, 511 S.W.2d 461 (Tenn. 1974). Our authority "to make rules governing the practice of law is traditional, inherent and statutory. Such

power is indispensable to the orderly administration of justice." Barger v. Brock, 535 S.W.2d 337, 342 (Tenn. 1976). No person shall engage in the practice of law in Tennessee, except pursuant to the authority of this Court. Rule 7, Section 1.01, Rules of the Supreme Court.

The office of District Attorney constitutes no shield or protection to an attorney who violates his oath as an attorney or the disciplinary rules of this Court. Judges and district attorneys alike are not only subject to the disciplinary rules of this Court, but are subject to annual registration and payment of a license fee to support the attorney disciplinary system. Petition of Tennessee Bar Ass'n, 539 S.W.2d 805, 809 (Tenn. 1976), Rule 9, Section 20.1.[3/]

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3/ Judges and district attorneys alike (continued...)

Disciplinary proceedings which result in disbarment or suspension from the practice of law are not equivalent to impeachment. A disbarment is a removal of a law license; an impeachment is the removal from office. They are not the same. In In re Murphy, 726 S.W.2d 509 (Tenn. 1987), Judge Ira Murphy's law license had been suspended based upon Rule 9, Section 14 of the Disciplinary Rules governing the conduct of attorneys. He was appealing the judgment of the Court of the Judiciary which recommended that the General Assembly remove him from office. He had already had his law license suspended by this Court in a different proceeding; however, he was continuing to receive his full salary as a judge because

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3/(...continued)
are also subject to mandatory continuing legal education. Rule 21, Section 2.01 et seq., Rules of the Supreme Court.

the sole method of removal from office is impeachment by the Legislature under Article VI, Section 6.[4/]

The issues of whether Judge Murphy's federal convictions were serious crimes so as to warrant "disbarment" and whether the convictions were grounds for "removal from office" were not identical. Id., at 513, 514. Two separate and distinct procedures are involved in disbarment and impeachment. In Schoolfield v. Tennessee Bar Ass'n, 209 Tenn. 304, 353, S.W.2d 401 (Tenn. 1961), the Senate "could not

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4/ Judge Murphy was convicted of a felony by a court of competent jurisdiction, and his law license was suspended by this Court pursuant to Rule 9, Section 14. This same rule applies to any attorney, be he judge, justice or district attorney general. If a district attorney were convicted of a felony and sentenced to imprisonment, his law license would be suspended, although he would still be entitled to his full salary unless removed from office by impeachment, Article VI, Section 6, or by the voters of his district at the next general election.

lawfully have passed upon the fitness of the judge to remain a member of the Bar; its powers as a Court of Impeachment are specifically limited to removal from office and disqualification." 209 Tenn. at 312, 353 S.W.2d at 404.

In response to Appellant's argument that he cannot be disbarred while serving as District Attorney General, the Court, in Schoolfield, specifically found that "[a] lawyer may be disbarred for misconduct occurring while he is acting as a judge...." 209 Tenn. at 313, 353 S.W.2d at 405. It follows that a lawyer may be disbarred for misconduct while acting as a district attorney.

Appellant avers that the Code of Professional Responsibility, Rule 8, Rules of the Supreme Court, at no point purports to regulate district attorneys. He is in

error. Rule 8, DR 7-107 expressly applies to prosecutors. See, In re John Zimmerman v. Board of Professional Responsibility, 764 S.W.2d 757 (Tenn. 1989). The Appellant testified that when he ran for office he promised he would be accountable to the public and he would "speak to the press subject to the rules of pretrial publicity," and he pledged to those present at the hearing, "I will not talk about pending cases, DR 7-107,...." Although Appellant testified that he would follow the mandates of DR 7-107, he contends he is not subject to disciplinary action under the Rules. This position seems somewhat inconsistent. We hold that the Disciplinary Board, the hearing committees and this Court have jurisdiction over the Appellant and all District Attorneys General admitted to practice law in this State. Rule 9, Section 1.1.

## II
## DENIAL OF DUE PROCESS

Appellant avers that the manner in which the proceedings were conducted before the Hearing Panel and the Chancellor violated the guarantees of procedural due process afforded by Article I, Section 8 of the Tennessee Constitution and the due process clause of the Fourteenth Amendment of the United States Constitution. He first avers that the Hearing Panel and the Chancellor were not neutral, detached, and impartial triers of fact. He alleges that the decision makers were tainted with the appearance of interest and bias. Appellant has made allegations of actual and apparent interest or bias on the part of the triers of fact, but the record fails to support these claims. Assuming, arguendo, that Appellant had proved interest or bias

existed on the part of the Hearing Panel, this would have been cured by the de novo hearing in the Chancery Court. A de novo review in Chancery Court readjudicates the matter in a neutral forum, completely eliminating any interest or bias on the part of a Hearing Panel. Cf. Cooper v. Williamson County Bd. of Educ., 746 S.W.2d 176, 183 (Tenn. 1987); Potts v. Gibson, 225 Tenn. 321, 332, 469 S.W.2d 130, 135 (1971). Likewise, any interest or bias on the part of the Chancellor would be cured by our de novo review "upon the transcript of the record from the Circuit or Chancery Court, which shall include the transcript of evidence before the hearing committee." Rule 9, Section 1.3, Rules of the Supreme Court. See, Scruggs v. Bracy, 619 S.W.2d 101, 103 (Tenn. 1981).

Appellant next asserts that due process requires that notice be given both

of the charges and the facts which would support an adverse decision against an individual, and that the Petition for Discipline failed to meet the minimal standards of adequate notice. The first three paragraphs in the Petition set out the jurisdiction of the Board to consider this matter and the procedure by which the matter came before the Board. Paragraphs four through twelve set forth the facts, and paragraphs thirteen through fifteen set forth the various disciplinary rules which Appellant is accused of violating and a brief explanation of the reason for such violations. Counsel on direct examination of Appellant went over the allegations in the Petition paragraph by paragraph, and Appellant's answers to counsel do not indicate any misunderstanding by him as to what he was being charged with. We find that the

Petition gave adequate notice to Appellant.

Appellant also contends that he was denied a true de novo hearing before the Chancellor, and that neither the Hearing Panel nor the Chancellor made a true judicial determination of his case. The record simply fails to support these contentions.

## III
## CONSTITUTIONAL RIGHT TO FREE SPEECH

The Petition for Discipline charged the Appellant with making four impermissible "remarks to the public" that were "gross, disrespectful, knowingly false, derogatory, and damaging to the legitimacy of, and trust in, the judicial system--in violation of DR 1-102(A)(5) and

[DR] 8-102(B)."5/ The Petition also charged that Appellant's remarks constituted "conduct adversely reflecting upon [his] fitness to practice law, unprofessional conduct, and conduct rendering [him] unfit to be a member of the bar" in violation of DR 1-102(A)(1)(5)

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5/ DR 1-102. Misconduct.--(A) A lawyer shall not: (5) Engage in conduct that is prejudicial to the administration of justice.

DR 8-102. Statements Concerning Judges and Other Adjudicatory Officers.--(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

and (6) and T.C.A. § 23-3-201(5).[6/] The remarks were as follows:

1. On February 23, 1979, Appellant was reported as having stated to The Oak Ridger: "My bottom line is that the judge is mucking up my cases and I can't stand for that."

2. On October 24, 1979, Appellant was reported as having said to The Oak Ridger: "I don't have time for this horse manure."

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6/ "DRI-102. Misconduct.--(A) A lawyer shall not: ... (1) Violate a Disciplinary Rule.... (5) Engage in conduct that is prejudicial to the administration of justice. (6) Engage in any other conduct that adversely reflects on his fitness to practice law."

"T.C.A. § 23-3-201. Grounds for disbarment or discipline.--Any attorney, solicitor or counselor at law admitted to practice in the courts of the state may be disbarred or suspended from the practice of law: ... (5) Who shall be guilty of any unprofessional conduct, dishonesty, malpractice, or any conduct which renders him unfit to be a member of the bar."

3. On March 30, 1981, Appellant wrote to The Guiness Book of World Records requesting inclusion in same as "The District Attorney with most contempt and disciplinary actions filed against him."

4. On December 3, 1981, Appellant was reported by The Clinton Courier News as having said of [the November 1981 recommendation by a hearing panel of the Board of Professional Responsibility that he be suspended for 90 days]: "When I find that I'm suspended by Almighty God, I'll know that I'm guilty of wrongdoing, not before."

The Hearing Panel found that although the "statements are crude and unbecoming of any licensed lawyer ... we do not believe they should be found to be

violative of the Rules of Discipline. The right of free speech may not be absolute, but it does appear to be broad enough to protect these expressions." The Chancellor found, however, that the remarks "are simply not privileged" nor constitutionally protected. Disciplinary Counsel candidly points out that the remarks of Appellant are more impressive as indications of lack of remorse than as individual violations of the disciplinary rules. Disciplinary Counsel contends that "lack of remorse" is an aggravating factor in determining the type of discipline imposed or the degree of sanctions to be meted out.

Appellant admits making the above cited, out of court, public statements; however, he avers that the quote about "the judge is mucking up my cases" was creative journalism on the part of the

reporter. He states that "I did not say those words. I do feel that's the case, however." The remarks made by Appellant were disrespectful, ill-advised, and as the Hearing Panel stated, they were "crude and unbecoming of any licensed lawyer."

Appellant's principal argument is that each of his remarks is fully protected under the First Amendment of the United States Constitution and the Freedom of Speech clause of the Tennessee Constitution, Article I, Section 19.7/

In dealing with First Amendment questions, we must balance the right of the speaker to communicate and the right

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7/ "The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty...." Article I, Section 19.

of the listener to receive his expressions with the need of the courts to enforce attorney discipline to the end that a lawyer will not engage in conduct that is prejudicial to the administration of justice, DR 1-102(A)(5), or degrading a tribunal, DR 7-106(C)(6), and thereby diminishes the confidence of the public in our courts. There is thus a delicate balance between a lawyer's right to speak, the right of the public and the press to have access to information, and the need of the bench and bar to insure that the administration of justice is not prejudiced by a lawyer's remarks. In balancing these rights, we must ensure that lawyer discipline, as found in Rule 8 of the Rules of this Court, does not create a chilling effect on First Amendment rights.

The right of free speech and free discussion as it relates to the institution of the law, the judicial system and its operations, is of prime importance under our system and ideals of government. A lawyer has every right to criticize court proceedings and the judges and courts of this State after a case is concluded, so long as the criticisms are made in good faith with no intent or design to willfully or maliciously misrepresent those persons and institutions or to bring them into disrepute. As stated by this Court in In re Hickey, 149 Tenn. 344, 386, 258 S.W. 417, 429 (1923), "the members of the bar have the best opportunity to become conversant with the character and efficiency of our judges. No class is less likely to abuse the privilege, as no other class has as great an interest in the preservation of an able and upright

bench. The rule contended for by the prosecution, if adopted in its entirety, would close the mouths of all those best able to give advice, who might deem it their duty to speak disparagingly."

Recently, the Oklahoma Supreme Court in addressing the free speech issue stated, "In keeping with the high trust placed in this Court by the people, we cannot shield the judiciary from the critique of that portion of the public most perfectly situated to advance knowledgeable criticism, while at the same time subjecting the balance of government officials to the stringent requirements of New York Times Co. v. Sullivan [376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)]." State ex rel. Oklahoma Bar Ass'n v. Porter, 766 P.2d 958, 968-69 (Okla. 1988).

Statements made by a lawyer designed to willfully, purposely and maliciously misrepresent the judges and courts of this State, and to bring those persons and institutions into disrespect, will not be tolerated or condoned. There is no First Amendment protection for remarks critical of the judiciary when those statements are false. A statement shown to be false will subject a lawyer to disciplinary sanctions. False statements with reference to judges and courts can be prejudicial to the administration of justice and subject to disciplinary action under DR 1-102(A)(5).

> It is the duty of an attorney to refrain from doing anything which will tend to destroy the confidence of the public in the courts, or to bring the courts into disrepute....
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> It is the duty of the lawyer to maintain toward the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges not being wholly free to defend

> themselves, are peculiarly entitled to receive the support of the bar against unjust criticism and clamor.
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> This is a duty which the attorney owes to his profession; an obligation to which he should subordinate his personal animus toward the particular individual who happens to be filling the office.

In re Hickey, 149 Tenn. at 389, 258 S.W. at 430.

The remarks made by Appellant were disrespectfully and in bad taste; however, we agree with the Hearing Panel that the right of free speech is "broad enough to protect these expressions" made by the Appellant. Use of the Disciplinary Rules to sanction the remarks made by General Ramsey in this case would be a significant impairment of First Amendment rights.

## IV
## THE SUFFICIENCY OF THE EVIDENCE

Appellant concludes by arguing that "no evidence was presented and no proof adduced sufficient to find that Appellant had violated any of the disciplinary rules listed in the Petition." We have before us concurrent findings of fact that Appellant violated DR1-102(A)(5) (conduct that is prejudicial to the administration of justice), and DR 7-106(C)(6) (undignified or discourteous conduct which is degrading to a tribunal).

The Hearing Panel made findings of fact which were adopted by the Chancellor. Our review of the record supports their findings. We shall describe some of the incidents in outline form, for a detailed recitation of the facts is unnecessary. On February 21, 1979, Judge Scott deferred action on a motion to suppress in a case involving Sally Davis. Appellant argued

that if the confession in question was not suppressed before the trial commenced, jeopardy would attach and he would be unable to build a case without the confession. Appellant then stated that he would then file a nolle prosequi. Judge Scott then indicated that he would not allow the State to dismiss the action and the Appellant responded that he refused to prosecute the case. Judge Scott then announced to the jury that the State did not wish to prosecute the case. While the court was so announcing to the jury, the Appellant rose from his chair and "in a noisy and hostile fashion" slammed the door as he left the courtroom. Appellant admitted before Chancellor Inman that he did in fact slam the door. The court ordered the Appellant to appear on February 26, 1979, to show cause why he should not be held in contempt. Judge Joseph Nigro was designated to hear the

contempt matter. At the hearing, Judge Nigro found Appellant guilty of contempt "in that he has been guilty of willful and deliberate attacks that attack the dignity of the court and show disrespect for the authority of the court." Judge Nigro ordered Appellant to pay a $50.00 fine and serve five days in jail. The jail sentence was suspended, and no appeal was taken.

On October 15, 1979, Roger Ridenour was representing a criminal defendant named Culbertson. After a phone conversation with Appellant, Mr. Ridenour believed that a plea-bargain had been agreed upon. The next day, after much confusion, Judge Scott asked Appellant if he had discussed a plea bargain with Mr. Ridenour. Appellant refused to answer the question. Judge Scott again ordered Appellant to answer the question.

Appellant again refused to answer. Appellant was then held in contempt and placed in jail pending his answer to the question. Appellant filed an appeal. The Court of Criminal Appeals affirmed Judge Scott's determination that Appellant acted in total disobedience to a lawful order of the Court. The Court of Criminal Appeals found "the trial judge exercised patience and restraint necessary before taking action for the administration of his court. Furthermore, the refusal to answer the question was in direct contempt." No further appeal was sought by Appellant.

On April 25, 1983, the Appellant was asked a direct question by Judge Scott and he refused to answer. Judge Scott found Appellant in contempt and fined him $50.00. An appeal was taken and the Court of Criminal Appeals, in affirming Judge Scott, held: "The transcript before us

contains sufficient evidence to justify a rational trier of facts in finding General Ramsey guilty of contempt beyond a reasonable doubt." This Court denied Appellant's Rule 11 Application for Permission to Appeal.

The final incident which we will discuss has been termed the "capias contempt." Judge James Witt was appointed by this Court to hear this matter, which involved a contempt by Appellant of an order of Judge Scott. On April 15, 1985, Judge Witt found Appellant in contempt of court and fined him $50.00 and ordered him to serve 10 days in jail. No appeal was taken.

## CONCLUSION

Based upon the above-described incidents, we find that an attorney who

fails to abide by court orders and fails to respond to questions from the court while appearing before the court, and who slams courtroom doors during hearings has not only degraded that court, but acted in a manner prejudicial to the administration of justice. We find the evidence sufficient to support the decision of the Hearing Panel and the decision of the Chancellor that the Appellant violated DR 1-102(A)(5) and DR 7-106(C)(6). The next issue concerns sanctions. Notwithstanding the judgments below, upon determining the existence of aggravating or mitigating circumstances, this Court may modify the judgment of the trial court. Disciplinary Bd. of Supreme Court v. Banks, 641 S.W.2d 501, 504 (Tenn. 1982).

We are of the opinion that the foregoing violations are sufficient to justify the imposition of a suspension

from the practice of law for 180 days, and the judgment of the Chancery Court is affirmed. However, under all of the circumstances of this case, we are of the opinion that it would be appropriate to have the Appellant's license suspended for only 45 of the 180 day period, and the remaining 135 days will be suspended provided the Appellant is not again found in contempt of court and in violation of the disciplinary rules of this Court during the remainder of his term of office ending August 31, 1990. If Appellant is again found to have violated Rule 8 of this Court, then his license to practice law will be automatically suspended for the remaining 135 days. Counsel for the parties shall agree upon the beginning date for Appellant's 45-day suspension. The suspension shall be completed on or before September 4, 1989. If the parties are unable to agree upon a beginning date,

the Court will fix the time of commencement.

The judgment of the trial court, as modified, is affirmed at the cost of Appellant.

COOPER, HARBISON and O'BRIEN, JJ., and McLEMORE, Special Justice, concur.

**Exhibit B**

[Filed 4/27/89]

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

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|---|---|
| JAMES NELSON RAMSEY,<br><br>Petitioner-Appellant,<br><br>v.<br><br>BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE<br><br>Respondent-Appellee. | SC No. 49 (Also S/C No. 48)<br>Anderson Equity #2736-7-CM |

PETITION FOR REHEARING

Pursuant to Rule 39, Tennessee Rules of Appellate Procedure, Petitioner respectfully requests that this Court grant rehearing of its order dated April 17, 1989, which, affirms and modifies the judgment of the trial court.

## GROUNDS

For grounds Petitioner shows that (1) the court's opinion incorrectly states the material facts established by the evidence and set forth in the record; (2) that the court's opinion is in conflict with a statute, prior decision, or other principle of law; and (3) the court's opinion overlooks or misapprehends a material fact or proposition of law.

## INTRODUCTION

Not all general and particular issues of law and fact critical to the administration of justice in Tennessee raised before this Court were addressed in its opinion, and some were misapprehended, thereby leaving doubt and uncertainty as to the status of the Petitioner and his ability to function in the executive role

of District Attorney General as envisioned by the framers of Tennessee's Constitution.

This case as it stands establishes the principle in Tennessee that attorneys, who know the inside workings of the court system, may openly criticize judges so that the failings of the justice system can be exposed to the public thereby benefiting the administration of justice.

Nevertheless the opinion fails to address the consequences to state government of certain constitutionality significant issues of due process of law raised in Petitioner's brief.

In trying the suspension directly to the term of office, the Court is in essence saying that as long as the District Attorney is an elected official

they are going to hold him under the "Sword of Damocles"--they are meting out a non-judicial sanction. The judgment of this Court places Petitioner Ramsey and his office under a cloud during the period of the suspended sanction.

While the opinion upholds Petitioner's First Amendment rights to criticize the judiciary, the new sanction imposed renders him subject to the "chilling effect" on his legitimate discretionary authority as an elected executive official which is represented by an "automatic penalty" imposed by the judiciary and related to no other time period than his term of office.

## DISCUSSION

I. With respect to Petitioner's case the opinion fails to address the issue of

statute of limitations and laches in regard to the first three of the four contempt convictions referenced therein as a basis for discipline. All but one of these (the so-called "capias incident" of 1985) had been resolved from two (2) to six (6) years prior to the filing of the Petition for Discipline in this case. It is questionable whether a State can establish a category of civil action with no statute of limitations, especially in view of Tennessee's one (1) year statute of limitations for legal malpractice or personal injury which should apply when no statute is otherwise stated.

II. The Opinion fails to address the issues of collateral estoppel and res judicata with respect to the two contempt convictions of 1979, where Judge Scott's complaints to the Board were officially dismissed. Dismissal was after Petitioner

had been required by Supreme Court Rule to respond or face summary penalty, and Petitioner relied to his detriment upon the dismissal, which was communicated to him by letter from Chief Disciplinary Counsel for the Board dated June 18, 1980. A copy of this letter is appended to Petitioner's reply brief.

III. The Opinion fails to address the issue of Petitioner's Fifth and Sixth Amendment rights under the United States Constitution regarding the October 16, 1979, "Culbertson" incident where the District Attorney was in custody and asserting his right to remain silent. The opinion recites that Petitioner was found in contempt for failure to answer a question, and the record reflects that this was after Petitioner asserted his right to remain silent pursuant to the Fifth Amendment and while Judge Scott

continued to interrogate him despite Petitioner's request for assistance of counsel.

IV. The Court automatically found violations because trial judges issued contempt judgments against Petitioner. The Court did not examine the facts de novo. For example the Court refers only to "the capias incident" when in fact there was no "incident" at all, but a complex procedure which the District Attorney failed to negotiate to Judge Scott's satisfaction. In fact there is no way a reader of the opinion can discern the facts of what the court refers to as the "capias incident".

V. The opinion fails to address the constitutionality of the disciplinary procedures under the Due Process Clause of the Fourteenth Amendment to the United

States Constitution, particularly with regard to the trier of fact. In any state judicial or quasi-judicial proceeding whether civil or criminal, neutral, detached and impartial triers of fact are required in order to afford due process of law under Fourteenth Amendment to the United States Constitution.

Acceptable procedures for selecting triers of facts include selection by an authority other than the parties to the dispute (for example, judges elected by the voters) or selection with input from the parties to the dispute (for example, usual methods for choosing jurors or arbitration panels).

Because of the appearance of impropriety and the potential for bias, a system which allows one of the adversary parties to a dispute to choose the trier

of fact with no input from the opposing party is perceived as fundamentally unfair.

It is irrelevant that the particular trier of fact chosen by such a system may in fact be impartial. The Supreme Court has not held that all magistrates who received fees for issuing warrants were biased or that all prosecuting attorneys who issued warrants were unfair, rather that these systems were unacceptable because of the appearance of and potential for bias. Connally v. Georgia, 429 U.S. 245 (1977), Coolidge v. New Hampshire 403 U.S. 443 (1971). Furthermore, furnishing a trial de novo on appeal does not dispense with the requirement of a neutral trier of fact in the initial proceeding. Ward v. Village of Monroeville 409 U.S. 57, 61 (1972).

Tennessee's procedure is unfair. Under Rule 9 of the Tennessee Supreme Court, Disciplinary Counsel files a petition against a respondent-attorney charging some specific violation of the Code of Professional Responsibility. Disciplinary Counsel is selected by and serves as an agent of the Board of Professional Responsibility. The Board and the respondent-attorney are adversaries in a hearing before a committee of three attorneys impaneled to determine the truth of the charges in the petition. These three attorneys are selected by the Board, from a pool of attorneys designated by the Supreme Court, and the three attorneys must report back their finding to the Board. The respondent-attorney is allowed no role in the selection of the three attorneys who serve on the hearing committee.

This procedure is the functional equivalent of allowing the plaintiff in a civil case or the State in a criminal case to select the jury from the venire without any input from the civil or criminal defendant.

Such a system does not comply with ordinary concepts of fairness and due process of law, and decisions reached under such a system are constitutionally suspect. A de novo hearing before a court cannot cure the constitutional due process violation inherent in the rule itself.

VI. The opinion does not address the issue of statutory interpretation of T.C.A 8-7-104, T.C.A 8-7-502 and T.C.A. 17-1-106. The code of Professional Responsibility (Rule 8, Tennessee Supreme Court) at no point purports to regulate

the conduct the "judges" or "district attorneys". Only the general term "lawyer" is used. The Code is defined as "the ethical standards relating to the practice of law" and does not mention "judges" or "district attorneys". Yet by statutory law a Tennessee district attorney is prohibited from the "practice of law" (T.C.A. 8-7-104). In fact, the public functions performed by district attorneys and judges are not in ordinary English usage considered the "practice of law" which generally refers to the performance of service for individual and corporate clients.

When the Legislature has perceived a need to provide for discipline of judges or district attorneys in addition to the impeachment provisions for removal, it has done so specifically. For example, the Legislature has detailed a procedure

whereby the Supreme Court may reprimand or suspend a judge for a maximum of thirty (30) days (on full salary) without recourse to impeachment. T.C.A. 17-1-106, et seq. The Legislature has also given the Board of Professional Responsibility very limited jurisdiction over district attorneys specifically for misconduct before a grand jury. T.C.A. 8-7-502. The constitutionality of these statutes has not been tested.

If the Board of Professional Responsibility has jurisdiction over all misconduct by a district attorney, T.C.A. 8-7-502 would not have been enacted. Inclusio unius est exclusio alterius. The Tennessee Supreme Court, while harboring doubts about constitutionality, has indicated that any provisions of law which purport to be able to remove Constitutional Officers subject to

impeachment would refer to those Officers in specific terms and not just a general term. In Re Dender, 591 S.W.2nd 491 (1978).

VII. The opinion fails to address the issue of separation of powers which was not present in the Schoolfield or Murphy cases because they involved members of the Judiciary and not members of the Executive Branch. By suspending the District Attorney for forty-five (45) days and placing him in effect on probation tot he Board and the Courts for the remainder of this term, the Judiciary will control an executive prosecutorial function directly for forty-five (45) days and indirectly for the remainder of the term of the District Attorney.

VIII. The opinion fails to address the issue of its practical consequences with

respect to the duties of the District Attorney's office as expressed by statute and through Petitioner's oath of office. Since neither Rule 8 or Rule 9 nor this Court's opinion describe what a suspended District Attorney as opposed to a suspended private attorney must do (even though the Court ruled that District Attorneys are covered by the disciplinary rules and sanctions), the District Attorney and his authorized agents the assistant district attorneys must choose between obeying statutory mandates (TCA 8-7-103) set by the Legislature regarding attending the courts in his district and preparation of indictments, etc. on the one hand, and doing what the Board directs on the other.

IX. The opinion fails to address the issue of representative government in our form of democracy. The Constitution of

the State of Tennessee specifies impeachment by the Legislature as the only method of removing a popularly elected District Attorney. This creates a vested right in the office in Petitioner absent impeachment, a right protected by the 14th Amendment to the U.S. Constitution, and also gives Petitioner standing to assert the right of the people who elected him to his services as District Attorney unless terminated by impeachment. The Tennessee Constitution provides for popularly elected local district attorneys who can be removed from office during term only by the Legislature, that is, by the duly elected representatives of the people. The obvious purpose is to facilitate a strong, independent prosecutor responsive to the local citizenry, who will remain undisturbed in the exercise of his office so long as he retains the confidence of the people.

X. The opinion fails to address the issue whether DR 1-102 (A) (5) and DR 7-106 (C) (6) under which Petitioner is suspended, are void for vagueness. Terms such as "conduct that is prejudicial to the administration of justice" and "undignified or discourteous conduct" do not give fair warning of the conduct which will be subject to disciplinary action, especially in view of the controversial nature of the office of District Attorney General. Such vaguely worded rules permit the finder of fact to define virtually any act as misconduct, making possible retaliation against District Attorneys such as Petitioner who have exercised their statutory and discretionary functions (including the charging function) in such a manner as to displease a judge, or who have openly been critical of the judicial system. Such

rules give the trier of fact unbridled discretion in interpreting the rules. These rules have not been, and probably cannot be, sufficiently narrowed by judicial interpretation.

XI. The opinion fails to address the constitutionality of the disciplinary procedures under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, particularly with regard to the unique sanction imposed. The portion of the sanction which is suspended (one hundred thirty-five (135) days) injects into the case a constitutionally unacceptable vagueness and indefiniteness, expanding the sanction imposed below by both the Hearing Panel and the Trial Judge, and tying the penalty directly into the term of his elected office as District Attorney General.

## CONCLUSION

The Tennessee Supreme Court was able to write a coherent opinion by failing to address the arguments made and demonstrated by Mr. Ramsey.

Thus, the Supreme Court ignored:

1. The fact that the alleged "insults" to Judge Scott occurred many years ago; even the most recent event occurred four years ago.

2. The fact that Mr. Ramsey was actually acquitted of two of the four incidents;

3. The fact that the Fifth and Sixth Amendment of the Bill of Rights entitled Mr. Ramsey to remain silent after he was

taken into custody by the order of Judge Scott;

4. The fact that the Disciplinary Board Panel that initially heard the case against Mr. Ramsey was biased because its members had cases pending before Judge Scott who was the sole complainant;

5. The fact that the appellate judge who was required to give a fair and impartial review of the Disciplinary Board decision had prejudged the case;

6. The fact that District Attorneys are elected officials with certain immunities;

7. The fact that under the Constitutional doctrine of Separation of Powers judges are not authorized to

participate in the executive activities of elected District Attorneys.

By reason of the foregoing, the petition for rehearing should be granted and the judgement below should be vacated.

Respectfully submitted, this the 27th day of April, 1979.


/s/
James N. Ramsey
Petitioner
P.O. Box 3031
Oak Ridge, TN 37830-3031
(615) 457-5640

/s/
JAMES E. FOGLESONG
Attorney for Petitioner
Third Floor
612 Gay Street
Knoxville, TN 37902

/s/
OF COUNSEL:
KIRKPATRICK & LOCKHART

Roger M. Adelman, Esq.
Ned I. Miltenberg, Esq.
1800 M Street, N.W.
Washington, D.C. 20036-5891
(202) 778-9000

CERTIFICATE OF SERVICE

I, hereby certify that the foregoing petition for rehearing is presented in good faith and not for purposes of delay.

/s/
James N. Ramsey
Petitioner
P.O. Box 3031
Oak Ridge, TN 37830-3031
(615) 457-5640

/s/
JAMES E. FOGLESONG
Attorney for Petitioner
Third Floor
612 Gay Street
Knoxville, TN 37902

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petition to Rehear has been delivered by mailing a copy of same, postage prepaid, by U.S. Mail to the Defendant at Suite 405, The Oak Tower, 1101 Kermit Drive, Nashville, Tennessee 37217.

/s/
James E. Foglesong
Attorney for Petitioner

**Exhibit C**

[FILED
May 22, 1989
Robert W. Summar,
Clerk
By_____]

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

| | | |
|---|---|---|
| JAMES NELSON RAMSEY, | ) | NOT FOR PUBLICATION |
| Petitioner-Appellant, | ) | |
| | ) | Filed May 22, 1989. |
| v. | ) | |
| | ) | ANDERSON EQUITY |
| BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE, | ) | Hon. William Inman, Judge |
| Respondent-Appellee. | ) | S/C No. 49 |

OPINION ON PETITION TO REHEAR

The Appellant, James Nelson Ramsey, has filed a Petition to Rehear which the Court has considered but found to be without merit. According, the Petition to Rehear is denied at the cost of the Appellant.

/s/ Frank F. Drowota, III
FRANK F. DROWOTA, III
Chief Justice

Concur:

Cooper, Harbison and O'Brien, JJ.
McLemore, Sp. J.

SUPREME COURT OF TENNESSEE
AT KNOXVILLE
SEPTEMBER TERM 1988

Filed May 22, 1989
Robert W. Summar,
Clerk

| | | |
|---|---|---|
| JAMES NELSON RAMSEY, | ) | |
| | ) | |
| Petitioner-Appellant | ) | |
| | ) | |
| v. | ) | S/C NO. 49- |
| | ) | Anderson |
| BOARD OF PROFESSIONAL | ) | Equity (No. |
| RESPONSIBILITY OF THE | ) | 2736-7-CM) |
| SUPREME COURT OF | ) | |
| TENNESSEE, | ) | |
| | ) | |
| Respondent-Appellee | ) | |

PETITION TO REHEAR DENIED

This cause came on to be further heard on the Petition to Rehear filed by the Appellant, James Nelson Ramsey, and upon consideration thereof the Court is of the opinion the Petition to Rehear is not well taken and should be denied.

It is therefore, ordered and decreed by the Court that the Petition to Rehear is denied, at the cost of the Appellant.

Frank F. Drowota, III, C.J.
Robert E. Cooper, J.
William J. Harbison, J.
Charles H. O'Brien, J.
Brooks McLemore, Sp.J.

**Exhibit D**

# Mandate

STATE OF TENNESSEE

To the Honorable, the Judge of the Chancery Court of Anderson County, holding and presiding at Clinton Tennessee:

WHEREAS, In our SUPREME COURT, at Knoxville, at the September Term, 1988, it was adjudged and ordered in the case of JAMES NELSON RAMSEY vs. BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TN brought before us by appeal from your Court, that the same be remanded thereto for further proceedings and final determination therein. These are, therefore, to command you, the Court aforesaid, that you proceed with the execution of this judgment of our said Supreme Court by such further proceedings in your Court as shall effectuate the objects of this order to remand and attain the ends of justice.

Witness, Robert W. Summar, Clerk of our said Supreme Court, at office in Knoxville, this 30th day of June, 1989.

Robert W. Summar, Clerk

By /s/ Helen J.

Deputy Clerk

[FILED Jul 06, 1989
10:15 o'clock a.m.
Forrest Bridges,
Clerk & Master]

SUPREME COURT OF TENNESSEE, AT KNOXVILLE

SEPTEMBER TERM 1988

Filed April 7, 1989

Robert W. Summar, Clerk

DECREE

| | |
|---|---|
| JAMES NELSON RAMSEY,<br>Petitioner-Appellant<br>Vs.<br>BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE,<br>Respondent-Appellee | Anderson Equity<br>Mod. and Affd.<br><br>No. Below:<br>2736-7-CM |

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Anderson County, briefs of the parties, and argument of counsel, upon consideration whereof the Court is

of the opinion that the judgment of the trial court should be affirmed, as modified in this Court's Opinion.

It is therefore ordered and decreed by the Court that the judgment of the trial court, as modified in this Court's Opinion, is affirmed and this cause is remanded to the Chancery Court of Anderson County for such further proceedings as may be necessary consistent with the Opinion of this Court, a copy of which shall accompany the mandate on the remand to the trial court.

Costs are adjudged against the Appellant, James Nelson Ramsey, and execution may issue from this Court for the costs incident to the appeal. This cause is remanded to the trial court aforesaid for collection of the costs adjudged therein.

Frank F. Drowota, III., C.J.
Robert E. Cooper, J.
William J. Harbison, J.
Charles H. O'Brien, J.
Brooks McLemore, Sp. J.

I, Robert W. Summar, Clerk, hereby certify that this is a true and exact copy of the original decree filed in this cause.

This 30th day of June, 1989.

ROBERT W. SUMMAR, CLERK OF COURT

By /s/ Helen J. D.C.

**Exhibit E**

[FILED
JAN 13 1988
10:30 O'CLOCK A.M.
FORREST BRIDGES,
Clerk & Master]

IN THE ANDERSON COUNTY CHANCERY COURT

at CLINTON

| | | |
|---|---|---|
| JAMES N. RAMSEY | ) | |
| | ) | |
| Petitioner | ) | |
| | ) | |
| vs. | ) | No. 2736-7-CM |
| | ) | |
| BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE, | ) | |
| | ) | |
| Respondent | ) | |

JUDGMENT OF THE TRIAL COURT

This cause came on to be heard by Chancellor William H. Inman, Judge designated by the Supreme Court in this cause.

This hearing was on the appeal by James N. Ramsey from the Judgment of the Hearing Committee of the Board of

Professional Responsibility by certiorari to the trial court.

This review was on the transcript of the evidence before the Hearing Committee, its findings and judgment and upon the evidence and testimony the parties introduced at the trial before this Court.

Based upon the evidence and testimony introduced at a hearing before this Court on December 15, 1987, the transcript of the evidence before the Hearing Committee, and the entire record in the cause, the Court filed its memorandum opinion on December 18, 1987, and a subsequent memorandum, which are incorporated herein, affirming the decision of the Hearing Committee that the law license of James N. Ramsey be suspended for (180) days.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court to-wit:

1. That the Judgment of the Hearing Committee holding that the law license of James N. Ramsey be suspended for (180) days be affirmed.

2. That James N. Ramsey pay all the costs of this cause, for which execution may issue if necessary.

/s/ Wm. H. Inman
WILLIAM H. INMAN
Judge by Designation

DATED: _____

Certificate of Service
I certify that a true and
exact copy of this judgement
on ... (cannot read)

This the 13 day of January,
1988
Forrest M. Bridges, Clerk & Master
By: /s/ Klj
_____ Clerk

[FILED
JAN 13 1988
10:30 O'CLOCK A.M.
FORREST BRIDGES,
Clerk & Master]

**IN THE SEVENTH JUDICIAL DISTRICT
FOR THE STATE OF TENNESSEE
SITTING IN THE CHANCERY COURT FOR
ANDERSON COUNTY**

| | | |
|---|---|---|
| JAMES N. RAMSEY | ) | |
| | ) | |
| Petitioner | ) | |
| | ) | |
| v. | ) | No. 2736-7-CM |
| | ) | |
| BOARD OF PROFESSIONAL RESPONSIBILITY | ) | |

**MEMO**

The petitioner, in effect, wants the Court to negate the judgment herein by finding that "the court should not substitute its judgment for that of the Hearing Panel". The motion to adopt this truism is denied. The UAPA standard is inapplicable. Review is much broader.

The case was heard de novo. The standard of review is prescribed by Rule 9, of the Rules of the Supreme Court, which requires the trial court to weigh the evidence and determine the facts by a preponderance of the proof.

The Court found the facts, which are essentially undisputed, to be as recited by the Panel, and adopted these findings as the judgment of the Court.

Although the sanction imposed by the Panel appears to be remarkably lenient, given the petitioner's conduct, the Board did not seek review and the Court was of the opinion that he had no authority to increase the duration of the suspension, and therefore adopted, by affirmance, judgment of the Panel.

Counsel for the Board is requested promptly to prepare an appropriate judgment.

/s/ Wm. H. Inman
JUDGE, BY DESIGNATION

CERTIFICATE OF SERVICE

I hereby certify that I have mailed or personally furnished to all counsel or unrepresented parties in this cause, at their respective addresses as shown in the file, an exact copy of the foregoing memo.

This 11 day of Jan., 1988.

/s/ Forrest M. Bridges
Clerk and Master

**Exhibit F**

[FILED 12/18/87 at
8:45 a.m.
Forrest M. Bridges,
Clerk and Master]

IN THE SEVENTH JUDICIAL DISTRICT
FOR THE STATE OF TENNESSEE
ANDERSON COUNTY CHANCERY COURT

| | | |
|---|---|---|
| JAMES N. RAMSEY,<br>PETITIONER | ) | |
| v. | ) | CIVIL 2736-7-CW |
| BOARD OF PROFESSIONAL RESPONSIBILITY | ) | |

MEMORANDUM OPINION

An ad hoc Hearing Panel found that the Petitioner, who is District Attorney General of Anderson County, violated certain disciplinary rules promulgated by the Supreme Court of Tennessee and suspended his license for six months.

A Writ of Certiorari was issued at the instance of Petitioner, and the undersigned designated Judge heard the

case upon a de novo proceeding on December 16, 1987.

Petitioner insists that Rule 9 of the Rules of the Supreme Court is unconstitutional, as applied to him, because he is subject to removal only by impeachment. This issue is foreclosed at the trial court level; the Supreme Court has the exclusive prerogative to determine the constitutionality of its Rules. Carden v. Fones, 539 SW2d 810, (1976).

The three members of the Panel are accused of prejudice because they were counsel of record in various cases pending in the Anderson County Circuit Court which is generally presided over by Judge James B. Scott, who is a central figure in the controversial, episodic tenure of the Petitioner. The evidence concerning this issue is not very satisfactory - one of

the members may have had cases pending in the Circuit Court - but it is not believed that this is a disqualifying factor.

The Petitioner and his assistant testified at length respecting episodes which resulted in contempt citations and convictions in 1979, 1983 and 1985. These convictions speak for themselves and this Court obviously has no authority to look behind them. Petitioner apparently assumes the attitude of martyrdom - he says that he is responsible only to God- (or some such expression) and except for the door-slamming episode evinces no regrets for a litany of unprofessional acts.

The Board has considerable experience with the Petitioner, who claims, in this proceeding, that prior disposition of various complaints lodged against him are

res adjudicata and cannot again be considered. Suffice to state that this insistence is without merit, and will not be noticed further. Petitioner's prior disciplinary record must be considered.

Petitioner argues that his public utterances are constitutionally protected, and that he cannot be disciplined for making statements, to the Press or otherwise, which are critical of the Court. He denies one quote - and the Court accepts his denial - but his other pronouncements are simply not privileged. The license of the Petitioner is onerated with the duty to act responsibly and respectfully to the system which he serves.

The findings of fact by the Hearing Panel are not seriously controverted, and

are adopted by the court. The decision of the Panel is affirmed.

/s/ Wm. H. Inman
WILLIAM H. INMAN, JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I have mailed or personally furnished to all counsel or unrepresented parties in this cause, at their respective addresses as same are shown in the file, an exact copy of the foregoing _____.

This 18 day of December, 1987.

/s/ Forrest M. Bridges
CLERK & MASTER

**Exhibit G**

[FILED April 8, 1987
BOARD OF PROFESSIONAL
RESPONSIBILITY OF THE
SUPREME COURT OF
TENNESSEE
Mary Woodroof By: S.K.
Executive Secretary

IN DISCIPLINARY DISTRICT II
of the
BOARD OF PROFESSIONAL RESPONSIBILITY
of the
SUPREME COURT OF TENNESSEE

IN RE: James Ramsey Docket No. 85-252-2

FINDINGS AND JUDGMENT

This case was heard before a hearing panel consisting of Joe Mont McAfee, Ralph H. Noe, Jr., and Jack B. Draper, Chairman, on March 16 and March 17, 1987, in the Supreme Court Building in Knoxville, Tennessee. During the two day hearing, the panel heard the sworn testimony of witnesses, in person and by deposition, and forty-six (46) exhibits were received into evidence.* The panel has carefully

considered the pleadings and all the tendered evidence, and herewith renders its Findings and Judgment.

Preliminary, it seems appropriate to observe that the issues in this case affect or involve many persons; nevertheless, the operative facts are focused primarily on two persons. The case presents the lengthy and rather sad saga of the relationship between these two persons. One of these persons is the Respondent, James Nelson Ramsey, a licensed attorney and the duly elected District Attorney General of Anderson County, Tennessee. The other is Judge James B. Scott who likewise is a licensed attorney and the duly elected Judge of the Circuit and Criminal Court of Anderson County. Although its jurisdiction has been challenged, the panel believes that it has jurisdiction over the Respondent.

No such jurisdiction exists with respect to Judge Scott.

The relationship between the Respondent and Judge Scott is complex and it cannot be accurately described with one or even with a few words. Suffice it to say that the level of disaffection between them is exceeded only by the level of suspicion which each harbors for the other. The panel feels constrained to point out in this submission that the failure of these two elected officials to work cooperatively is harmful to the administration of the justice in Anderson County and borders on being a public disgrace.

The Petition for Discipline alleges multiple acts of contemptuous behavior by the Respondent, multiple public expressions regarding either the Court's

adjudications of contempt or the Board of Professional Responsibility's prior adjudication of discipline, and in addition, the Petition charges a pattern of behavior which violates the Disciplinary Rules.

The panel will first address the charges of unethical conduct based on the Respondent's public expression to the media or otherwise. The proof shows that most if not all these statements or expressions were made by the Respondent. The panel believes these statements are crude and unbecoming of any licensed lawyer and particularly of the Respondent who is a person of considerable intellect, well educated and extremely articulate. However these expressions may impress the panel, we do not believe they should be found to be violative of the Rules of Discipline. The right of free speech may

not be absolute, but it does appear to be broad enough to protect these expressions. The panel can only say that the Respondent, who appears to know and enjoy quoting the great literary figures of the past, can and should raise his sights considerably when he speaks for public consumption.

With respect to the various adjudications of contempt, the panel concludes that all of these, save the incidents in 1983 and 1985,. previously have been considered by the Board, and have been dealt with by dismissal or adjudication. The panel heard evidence touching these prior cases only as it might relate to the allegation of a patter of misconduct, or as it might relate to the nature of any discipline which might be adjudged in the pending case. The

panel obviously has no jurisdiction to reopen or retry any of the prior cases.

In April, 1983, the Respondent was found to be in contempt by Judge Scott and was fined Fifty Dollars ($50.00). This arose out of an incident which was referred to during the hearing as "Grand Jury List" incident. A detailed recitation of the facts is not required. Suffice it to say the Judge asked the Respondent a direct question which the Respondent refused to answer. The contempt finding followed. At the hearing the Respondent presented to the panel what sounded like a reasonable explanation of why he felt it was improper for him to provide this so called "list" to the Grant Jury Foreman. His explanation seemed to be buttressed by his strong conviction that the separation of governmental powers must remain inviolate. When asked why he

did not give the same or at lease some explanation to the Court, the Respondent said an answer by him would have only served to provoke an argument with Judge Scott and he would have been adjudged in contempt for what he said. Judge Scott denied this in his testimony. Whether a contempt adjudication would have followed the Respondent's answering of the Court's inquiry will never be known. He chose not to answer and the panel finds that his refusal was not only contemptuous but also was violative of DR 1-102(A)(5) and DR 7-106(C)(6).

In April, 1985, the Respondent again was adjudged to be in contempt. Judge James C. Witt conducted the hearing and made the adjudication. Respondent was fined $50.00 and sentenced to ten (10) days in jail. There was no appeal. In passing and in connection with the

Respondent's decision not to appeal, the panel notes the Respondent's testimony to the effect that he has learned or has become persuaded that it is useless to appeal a contempt conviction because the appellate court will always back up the trial court in contempt cases. This statement evinces a lack of respect for and confidence in our appellate process.

In the hearing record the 1985 contempt adjudication is referred to as the "Culbertson matter". The Respondent's conduct in this instance was not dissimilar to his conduct in the Grant Jury List matter in that it involved his failure to answer a direct question which was directed to him by Judge Scott. The events which preceded his failure to respond could almost be considered comical were it not for the fact that we are dealing with the real life affairs of

vitally important public offices. In brief summary, a problem or disagreement arose in Judge Scott's chambers over the contents of a plea bargain agreement; the Respondent's principal assistant, Ms. Jan Hicks, was present but was unable to answer or resolve the objection which was raised by the defendant's attorney because she had not been involved in the discussions which resulted in what was believed to be an agreement; Judge Scott asked Ms. Hicks where the Respondent was, but she was not at liberty to answer the Judge's question because the Respondent was engaged in some kind of confidential meeting and did not want his whereabouts to be known. For not answering, Ms. Hicks was sent to jail for contempt. Thereupon, efforts are commenced to locate and bring the Respondent before the Court. The Respondent says he was arrested in his office by two deputies from the sheriff's

office, and brought into the courtroom as an "accused". He says that he was very shaken and upset and that he really did not hear or comprehend what Judge Scott was saying or asking. This was his stated reason for not answering or responding to the Court. Judge Scott's testimony describes the events in much less fearsome terms. The Judge indicated that he would not have cited the Respondent for contempt if he had answered the Court's questions.

It is not necessary for the panel to decide exactly how Respondent was brought or chose to come into the courtroom, or exactly how much he was upset or distraught; the panel believes that either he should have answered Judge Scott's question(s) or asked for some time to compose himself so he could answer. He did neither and was found to be in contempt. This contemptuous behavior is

likewise violative of the two Disciplinary Rules cited above.

The next issue for the panel to decide is whether the Respondent is guilty of a pattern of behavior (contempt of court) which is violative of the Disciplinary Rules. The panel has not found a precise definition of "pattern" as used in this context. Its meaning will be expressed by describing its relevant and non-relevant attributes. Pattern conduct is conduct which is deliberate, intentional, repetitive and similar as opposed to conduct which is isolated, accidental, unrelated or peculiar. When viewed in light of these attributes the Respondent's conduct since 1979, as alleged in the Petition and established by the evidence, shows a pattern of disrespect for the Court. Every instance is different but they all contain a common thread of

indifference toward and disrespect for the Court. Real or believe provocation, devotion to the duties and the sanctity of one's office, pride or whatever else one might care to list should not and must not lead an officer of the Court into repeated, disrespectful clashes with the Court. Even if we had no Disciplinary Rules, our Judicial System is virtually stretched to the limit to accomplish its role in our society and its time and resources should not be wasted on the foolishness which the record in this case so painfully details. The activities of the Respondent prior to 1983 can be considered by this panel as a part of his professional record, and during the hearing he was given an opportunity to explain, mitigate and/or justify such conduct. The panel believes this is in keeping with the teachings of Berke v.

Chattanooga Bar Association, Tenn. App. 436 S.W.2d 296 (1968).

Despite indications in the record that the situation in Anderson County is not likely to change as long as the Respondent is the District Attorney and Judge Scott presides over the Circuit and Criminal Court, the panel simply rejects that proposition. In the Respondent, the panel sees a vast amount of talent, energy and devotion. These priceless resources need to be directed unremittingly toward the accomplishment of the important responsibilities of the office he holds. To consume even a small portion of those talents on foolishness is both senseless and a tragic waste.

In one of his statements to the press the Respondent indicated that he found solace in quotation from Jonathan Swift:

> "Censure is the tax a man pays to the public for being eminent."

The panel would commend certain other words of Swift to the Respondent for his careful and thoughtful consideration:

> "When a man's fancy gets astride on his reason; when imagination is at cuffs with the senses; and common understanding, as well as common sense is kicked out of doors; the first proselyte he makes is himself." Tales of a Tub, 1704.

Because of his violation of the Rules of Discipline in a manner which demonstrates a pattern of disrespectful behavior toward the Court, the panel adjudges that the Respondent should be suspended from the practice of law for a

period of one hundred and eighty (180) days.

Having made its findings and rendered its judgment, the hearing panel has one final comment: No individual or group, either directly or indirectly associated with this matter, should find comfort or solace in or feel vindicated by the findings and judgment set forth hereinabove. There are no winners. All concerned parties should examine their own conscience and strive to put an end to the hostilities and suspicion which appears to permeate the criminal justice system in Anderson County, Tennessee.

Signed and filed this 6th day of April, 1987, at Knoxville, Tennessee.

/s/
Ralph H. Noe, Jr.

/s/
Joe Mont McAfee

/s/ Jack B. Draper
Jack B. Draper
Chairman

*Exhibit No. 45 is an audio tape which is part of the record in Cause No. 75, Criminal Court of Appeals, Knoxville (State of Tennessee v. James N. Ramsey). Such tape remains in that Court file.

---

BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

I, MARY WOODROOF, Executive Secretary of said Board do hereby certify that the foregoing is a true, perfect, and complete copy of the Findings and Judgment of the Hearing Panel of said Board, entered on 8th day of April, 1987, in the cause of IN RE: JAMES RAMSEY
as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand, at Nashville, on this, the 8th day of April, 1987
/s/ Mary Woodroof (S.K.)
Executive Secretary

---

**Exhibit H**

[FILED April 21, 1987
BOARD OF PROFESSIONAL
RESPONSIBILITY OF THE
SUPREME COURT OF
TENNESSEE
/s/ Mary Woodroof
Executive Secretary]

**IN DISCIPLINARY DISTRICT II**
**of the**
**BOARD OF PROFESSIONAL RESPONSIBILITY**
**of the**
**SUPREME COURT OF TENNESSEE**

**IN RE: James Ramsey Docket No. 85-252-2**

**MOTION TO VACATE PANEL DECISION AND MOTION TO DISCLOSE TOTALITY OF CONFLICT OF INTEREST**

Comes the respondent James N. Ramsey and would show:

1. That Jack Draper and Joe Mont McAfee sat in judgment on an adjudicative panel of three attorneys and entered a decision against respondent James Ramsey after hearing evidence.

2. That the basis of the petition ~~against~~ James Ramsey came from complaints filed by Judge James Buddy Scott and the only two witnesses who testified before the panel against James Ramsey were chief witness Judge James Buddy Scott and his secretary Winzle Shockley. During his testimony Judge Scott disclosed his strong animosity against James Ramsey and personally appealed to the Board and the panel to take action against James Ramsey.

3. That at no time did Jack Draper or Joe Mont McAfee disclose to James Ramsey any potential conflict of interest in sitting on the panel or any pecuniary interest. Neither James Ramsey nor his office of District Attorney has any cases pending with the law firms of Jack Draper or Joe Mont McAfee. None of these lawyers would have even considered panel

membership if their clients were seeking any action from James Ramsey.

4. After the decision of the panel was leaked to the press by persons unknown, a fellow attorney disclosed that the law firm of Jack Draper had cases pending in the court of Judge James Buddy Scott.

5. Respondent James Ramsey, being concerned with criminal matters as District Attorney, had little knowledge of the civil docket in Judge Scott's court and prior to the disclosure by the attorney did not realize that anyone who sat in judgment of Judge Scott's complaints against him and matters before Judge Scott which affected their pecuniary interests.

6. Upon later checking the civil lawsuits filed in the Seventh District Court, presided over by Judge James B. Scott, respondent has found that while sitting on the Board of Professional Responsibility hearing panel in respondent's case, the law firms of Jack Draper and Joe Mont McAfee had cases pending before Judge James B. Scott, the chief witness against respondent. Attached as exhibits to this motion are documents from some of these cases, claims totalling over a million dollars.

7. There may be other civil suits before Judge Scott involving these law firms which respondent has failed to discover because the system in the Clerk's office is not fully computerized and a file by file search is required.

Wherefore, respondent moves that each of the three panel members be required to disclose on the record:

(1) Pending cases, by name and case number, in which their law firm represented a party in the court of Judge James B. Scott during the time when they were appointed to the hearing panel in James Ramsey's case.

(2) The amount of money at issue in the pleadings of such case; whether or not the law firm's fee is in any way related to the outcome of the case, whether the case is jury or nonjury, and whether any pretrial, trial or post-trial motions were filed requiring the judge's decision.

Respondent further moves that the decision of this panel be invalidated for the reason that respondent has been

deprived of a fair and impartial adjudicative body untainted by conflicts of interest as required by due process; and at the very least the appearance of impropriety has destroyed any confidence in the legitimacy of the panel's decision.

Respectfully submitted this the 16th day of April, 1987.

/s/ J. Ramsey
James N. Ramsey
Respondent

/s/ James E. Foglesong
James E. Foglesong
Attorney for Respondent
(by James N. Ramsey)

**Exhibit I**

[FILED 11/9/87 at
9:59 a.m.
Forrest M. Bridges,
Clerk & Master]

BEFORE THE BOARD OF PROFESSIONAL RESPONSIBILITY

RE: JAMES N. RAMSEY 2736-7-CM

MOTION TO VACATE

MAY 29, 1987

APPEARANCES:

FOR MR. RAMSEY:

JAMES E. FOGLESONG
ATTORNEY AT LAW
612 S. GAY STREET
THIRD FLOOR
KNOXVILLE, TENNESSEE

FOR THE BOARD:

WILLIAM W. HUNT, III
ATTORNEY AT LAW
1101 KERMIT STREET
SUITE 401
NASHVILLE, TENNESSEE
37217

BROWN & ASSOCIATES
COURT REPORTERS
814 STATE STREET, P.O. BOX 2347
KNOXVILLE, TENNESSEE 37901
615-524-2841

MR. DRAPER: I THINK EVERYONE IS PRESENT NOW, SO LETS PROCEED. THIS IS A FURTHER HEARING IN THE MATTER OF, IN RE: JAMES RAMSEY, L85-252-2. PRESENT AS MEMBERS OF THE HEARING COMMITTEE ARE RALPH H. NOE, JR., JOE MONT MCAFEE, AND JACK B. DRAPER, CHAIRMAN. PRESENT IS THE RESPONDENT, IN PERSON, AND REPRESENTED BY COUNSEL, JAMES E. FOGLESONG. AND PRESENT FOR THE BOARD OF PROFESSIONAL RESPONSIBILITY IS WILLIAM W. HUNT, III.

THIS PROCEEDING, AS HAVE BEEN ALL OTHERS IN CONNECTION WITH THIS MATTER, IS AN OPEN HEARING AND PERSONS OTHER THAN THE PARTIES, COUNSEL, AND MEMBERS OF THE PANEL ARE PRESENT IN THIS ROOM.

WE'RE HERE TODAY TO CONSIDER A MOTION THAT'S BEEN FILED BY THE RESPONDENT ENTITLED MOTION TO VACATE PANEL DECISION AND MOTION TO DISCLOSE TOTALITY OF

CONFLICT OF INTEREST THAT WAS FILED APRIL 21ST, 1987. AND ON THE FOLLOWING DAY, THERE WAS AN ADDENDUM TO THE MOTION TO VACATE PANEL DECISION, FILED BY THE RESPONDENT.

MR. FOGLESONG: IF IT PLEASE THE COURT, DO YOU WANT ME TO GO OVER EVERY MATTER IN THERE OR HAVE YOU READ IT.

MR. DRAPER: WE'RE PREPARED TO HEAR WHATEVER YOU WANT TO PRESENT.

MR. FOGLESONG: IF I MIGHT, THIS IS KIND OF A DELICATE MATTER, BUT I WOULD LIKE TO PUT ON PROOF, IF I COULD, TO SUPPORT THIS MOTION, THROUGH GENERAL RAMSEY. COULD I FUT HIM ON?

MR. DRAPER: CERTAINLY, ANYTHING YOU WANT TO DO.

JAMES RAMSEY,

HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. FOGLESONG:

Q. YOU'RE DISTRICT ATTORNEY GENERAL RAMSEY?

A. YES.

Q. AND YOU FORMERLY HAVE BEEN SWORN AND YOU KNOW THAT YOU'RE UNDER OATH IN THIS MATTER?

A. YES.

Q. GENERAL RAMSEY, THE MOTION TO VACATE THE PANEL DECISION AND THE MOTION

TO DISCLOSE THE TOTALITY OF CONFLICT OF INTEREST, THIS WAS FILED ON OR SUBMITTED AROUND OR ABOUT THE 18TH OF APRIL, 1987?

A. IF WAS ACTUALLY PREPARED EARLIER THAN THAT AND FILED ON THE 16TH AND APPARENTLY REACHED THE FILE THE 21ST.

Q. OKAY. MORE PARTICULARLY, WE HAVE SET OUT IN PARAGRAPH TWO THAT THE BASIS FOR THE PETITION AGAINST RAMSEY CAME FROM COMPLAINTS FILED BY JUDGE JAMES BUDDY SCOTT AND THE ONLY TWO WITNESSES TO TESTIFY BEFORE THE PANEL WERE JAMES RAMSEY, THE CHIEF WITNESS, JAMES BUDDY SCOTT AND HIS SECRETARY, WINZELL SHOCKLEY?

A. THAT'S CORRECT. THE ONLY LIVE WITNESS THAT TESTIFIED WAS JUDGE SCOTT AS TO SUBSTANTIVE MATTERS. THE OTHER LIVE WITNESS WAS WINZELL SHOCKLEY AND ALL SHE DID WAS PLAY THE TAPES.

Q. AND DURING HIS TESTIMONY, JUDGE SCOTT DISCLOSED HIS STRONG ANIMOSITY AGAINST JAMES RAMSEY AND PERSONALLY APPEALED TO THE BOARD TO TAKE ACTION AGAINST JAMES RAMSEY?

A. RIGHT. THE PARTIES AND THE PANEL WILL RECALL THAT JUDGE SCOTT IN HIS TESTIMONY MADE A PERSONAL APPEAL TO THE BOARD POINTING AT HIMSELF AND ASKING THEM TO DO SOMETHING ABOUT THE SITUATION AND MADE STATEMENTS TO THE EFFECT THAT HE KNEW THAT THIS WAS WRONG AND RAMSEY'S CONDUCT WAS WRONG AND MADE A PERSONAL APPEAL IN THAT MATTER THAT THE COURT DO SOMETHING ABOUT IT.

Q. AFTER THE FINDINGS OF THE BOARD OF PROFESSIONAL RESPONSIBILITY AND BEFORE YOU RECEIVED NOTICE, WAS CERTAIN

INFORMATION LEAKED OUT ABOUT WHAT THE FINDINGS WERE?

A. I WAS CALLED BY REPORTER DOUG RAY TO CONFIRM THAT I HAD HAD A SIX MONTHS SUSPENSION. THAT'S THE FIRST INKLING I HAD OF ANY RESULT IN THE CASE. I THEN --

Q. WAS THAT PRIOR TO THE 8TH OF APRIL, 1987?

A. IT WAS ON A THURSDAY, THURSDAY THE 7TH, YES.

Q. THE 7TH?

A. YES.

Q. AND WHEN --

A. -- NO, THAT WOULD HAVE BEEN THURSDAY, APRIL THE 9TH.

Q. AND --

A. MAYBE IT WASN'T A THURSDAY, I DON'T KNOW.

Q. WELL, I NOTICE THAT IT WAS FILED IN NASHVILLE ON APRIL 8TH OF '87, IS THAT WHAT YOUR UNDERSTANDING WAS?

A. I DIDN'T KNOW ANYTHING ABOUT IT WHENEVER -- WHATEVER DAY IT APPEARED IN THE OAK RIDGER IS WHEN HE CALLED ME.

Q. IN ANY EVENT, WHEN YOU CALLED ME ABOUT IT AND I DIDN'T HAVE A COPY OF IT, IS THAT CORRECT?

A. THAT'S RIGHT.

Q. AND IT WAS SOMETIME, MAYBE FOUR OR FIVE DAYS LATER BEFORE WE GOT A COPY?

A. YES. YOU, HOWEVER, CALLED TRIPP HUNT AND CONFIRMED TO ME THAT WAS THE RESULT.

Q. THE --

MR. DRAPER: LET ME INTERRUPT TO ASK A QUESTION. I WANT TO KNOW FROM MR. FOGLESONG AND THE RESPONDENT WHETHER OR NOT A STATEMENT IN SECTION FOUR IS IN ANY WAY DIRECTLY OR IMPLIEDLY AN ACCUSATION THAT A MEMBER OF THIS HEARING PANEL LEAKED THE DECISION? I WANT TO KNOW THAT.

Q. IF THE COURT PLEASE, I DON'T ACCUSE ANYONE. I AM --

MR. DRAPER: TO SAY BY PERSONS UNKNOWN, I CAN ASSURE YOU AND WILL NOW ASSURE YOU THAT NO MEMBER OF THIS

PANEL LEAKED THE CONTENTS OF THIS DECISION.

Q. I ACCEPT THAT. I DON'T ACCUSE THE BOARD OF ANYTHING OF THAT NATURE. I JUST -- I AM JUST BRINGING THE FACTS OUT.

NOW, AFTER THE FACTS CAME OUT, WERE YOU CONFRONTED BY A FELLOW LAWYER IN ANDERSON COUNTY WITH RESPECT TO MATTERS THAT HAD NOT BEEN BROUGHT TO YOUR ATTENTION.

A. WELL, IT CREATED AN UPROAR IN THE COMMUNITY AND THE UNIVERSAL REACTION WAS IT WAS VERY HARSH INCLUDING THE EDITORIAL IN THE OAK RIDGER. SAID SIX MONTHS WAS VERY HARSH. EVERYONE WAS CALLING UP MY HOUSE AND MY WIFE AND TALKING TO MY STAFF AND OTHERS WITH THIS EXPRESSION OF HARSHNESS OF A 180-DAY SUSPENSION IN VIEW OF THE TOTALITY OF THE CIRCUMSTANCES.

HOWEVER, ONE ATTORNEY SAID, WELL, I'M NOT SURPRISED. I'VE GOT A CASE RIGHT NOW AGAINST THE DRAPER FIRM. AND BASED ON THAT I WENT UP AND SEARCHED THE RECORDS AND IN FOUR HOURS, I FOUND 14 CASES, INCLUDING THE MCAFEE FIRM AND THE DRAPER FIRM. AT THAT TIME, THE 14TH WAS SUBSEQUENTLY DISCOVERED INVOLVING MR. NOE, BUT THAT WAS FILED SUBSEQUENTLY TO ALL OF THE PROCEEDINGS HE WAS INVOLVED WITH, SO I DID NOT INCLUDE IT IN THE MOTION. AS A MATTER OF FACT, I DIDN'T KNOW ABOUT IT AT THE TIME I FILED THE MOTION. I DISCOVERED IT LATER.

Q. HAD YOU EVER HANDLED CIVIL MATTERS?

A. AS DISTRICT ATTORNEY, I DON'T KNOW THAT THE CIVIL DOCKET IS AND DON'T PARTICIPATE IN CIVIL COURT. ALTHOUGH IT WAS PUBLIC RECORD THAT THIS PANEL WAS

IMPANELED, I DIDN'T KNOW OF IT AND HAD NO REASON TO THINK OF IT.

Q. IN ANDERSON COUNTY, IS JUDGE JAMES B. SCOTT, DOES HE HAVE CONCURRENT JURISDICTION WITH HIS BROTHER --

A. BROTHER-IN-LAW.

Q. -- BROTHER-IN-LAW, ALLEN KIDWELL?

A. THE TWO JUDGES OF THE SEVENTH JUDICIAL DISTRICT, ALLEN KIDWELL AND JAMES B. "BUDDY" SCOTT, HAVE CONCURRENT JURISDICTION FOR ALL FOUR DIVISIONS OF THAT COURT; PROBATE, EQUITY, LAW, AND CRIMINAL. EACH ONE CAN DO ALL OF IT.

Q. DO THEY INTERCHANGE THESE MATTERS BETWEEN THEMSELVES?

A. YES, QUITE FREQUENTLY. IN ONE CASE, FOR EXAMPLE, YOU WILL SEE THE SIGNATURE OF BOTH OF THEM.

Q. OFTENTIMES, THEY WILL ENTER ORDERS ON OTHER JUDGES' CASES?

A. RIGHT. IN SOME OF THESE EXAMPLES, THAT IS THE CASE.

Q. OKAY. NOW, IN CHECKING THROUGH THE RECORDS, YOU HAVE -- AND I ASK THAT-- DID YOU GO TO THE CLERK OF THE COURT; DID YOU GET CERTIFIED TRUE COPIES?

A. I GOT CERTIFIED COPIES OF EVERYTHING I COULD FIND. IT'S HARD TO FIND THINGS IN THE COURT, ESPECIALLY WHEN YOU'RE LOOKING FOR MEMBERS OF THE DRAPER FIRM OR MCAFEE FIRM WHO YOU DON'T KNOW. I DIDN'T KNOW, FOR EXAMPLE, THAT MY FRIEND TOM SCOTT WAS A MEMBER OF THAT

FIRM. I JUST KNEW HIM AS TOM SCOTT. BUT I SAW HIS NAME ON THERE. AND ON THE LETTERHEAD, IT'S THE DRAPER FIRM. AND, OF COURSE, I SAW HIM WALK BY TODAY.

Q. MORE PARTICULARLY, I WOULD LIKE TO INTRODUCE, IF I CAN -- I ONLY HAVE ONE COPY OF THESE ORIGINALS. I DIDN'T MAKE YOU COPIES.

MR. HUNT: DOESN'T MATTER, GO AHEAD.

Q. THE CASE OF JAMES F. STAIR VERSUS MACK SANDERS AND SHERRY SANDERS, HERBERT M. BACON, GEORGE GORTON AND C. KEITH PERKEY, AND JOHN PAXTON, DOCKET NUMBER 2534-7-CM.

A. IS THAT WHAT?

Q. IS THIS ONE OF THE CASES YOU FOUND?

A. THIS IS THE ONLY CASE I WAS ABLE TO FIND OF MR. NOE. AND IT WAS NOT FILED DURING THE PENDENCY OF HIS TENURE ON THE BOARD. THIS WAS FILED SUBSEQUENT TO THE DECISION. ALL OF THE OTHERS WERE FILED BETWEEN THE TIME WHEN THE MEMBERS WERE APPOINTED IN OCTOBER OF '85 AND THE DECISION WAS RENDERED ON APRIL 6, 1987. THIS ONE WAS NOT PENDING DURING THAT TIME; PERHAPS CONTEMPLATED, BUT NOT PENDING. IT WAS FILED ON APRIL 20TH, SO THIS IS THE EXCEPTION TO THE RULE.

Q. IT WAS MADE OUT ON THE 20TH OF APRIL?

A. RIGHT. THAT WAS.

Q. WE INTRODUCE THIS -- HOW MUCH DID THIS CASE INVOLVE?

A. THIS CASE IS A PARTITION SUIT, AS IT SAYS ON ITS FACE, REGARDING THE RADIO STATION, W.Y.S.H., ALLEGING A TOTAL AMOUNT AT STAKE OF $660,000. MR. NOE'S CLIENT HAVING A 20 PERCENT INTEREST OR $125,000.

Q. WAS THAT SIGNED BY RALPH NOE?

A. SIGNED BY HIS CLIENT AND RALPH H. NOE, JR., ATTORNEY FOR THE PLAINTIFFS.

Q. MAY WE INTRODUCE THAT AS EXHIBIT 1 TO THIS MATTER?

MR. DRAPER: WHAT IS THAT? IS THAT THE COURT FILE.

A. CERTIFIED TRUE COPY OF THE COMPLIANT.

MR. DRAPER: WELL, ABSENT OBJECTION FROM MR. HUNT, THE PANEL WILL RECEIVE AS EXHIBITS EVERY ONE OF THESE THINGS YOU HAVE SENT TO US. I DON'T DOUBT THAT THEY'RE CERTIFIED COPIES, THEY APPEAR TO HAVE THE CLERK'S CERTIFICATION STAMP ON THEM -- UNLESS OTHER MEMBERS OF THE PANEL HAVE A DIFFERENT VIEW ABOUT IT.

MR. MCAFEE: SEEMS TO ME THAT EVERYTHING OF RECORD IN THE ANDERSON COUNTY COURTHOUSE IS A MATTER OF PUBLIC RECORD. DO WE HAVE TO TAKE JUDICIAL NOTICE OF THAT FILE?

MR. DRAPER: IF YOU WANT TO FILE THAT, AS WELL, AND WE'LL JUST MAKE-- WE'LL JUST MAKE ALL OF THESE AS COLLECTIVE EXHIBIT 1 IN SUPPORT OF THE MOTION THAT'S BEEN FILED. IF YOU WANT TO DO IT, THAT'S SATISFACTORY.

Q. AND INTRODUCE THOSE AS A COLLECTIVE EXHIBIT?

A. THERE IS ONE MORE THEY DON'T HAVE. I THINK IT'S FARMER.

(COLLECTIVE EXHIBIT NO. 1 WAS RECEIVED IN EVIDENCE.)

A. ALL RIGHT, I DON'T THINK THEY HAVE GILLENWATER VERSUS ARGONAUT.

MR. DRAPER: IT'S HERE.

Q. WHY DON'T WE GO DOWN THE LIST? I HAVE ONE GILLENWATER. YOU THINK YOU HAVE THAT?

MR. DRAPER: LOOK, LET'S DO IT THIS WAY. LET'S NOT TAKE TIME DURING THE HEARING TO DOUBLE CHECK ALL OF

THESE. YOU CAN DO THAT AFTER THE HEARING. MULTIPLE PLEADINGS HAVE BEEN FILED HERE THAT BEAR INDICATION OF SOME CONNECTION OF THE INDIVIDUALS OR FIRMS OF THE HEARING PANEL WITH THESE LAWSUITS IN ANDERSON COUNTY.

A. IN SUMMARY -- IF YOU WANT TO GO ON.

Q. GO AHEAD.

A. I FOUND ONLY ONE CASE INVOLVING THE MCAFEE FIRM. AND IT WAS BY THEIR ASSOCIATE, T. HOWARD PINKLEY. IT INVOLVED A CLAIM OF $250,000 WITH A SUMMARY JUDGEMENT GRANTED BY JUDGE SCOTT WITH NO REQUIREMENT FOR AN ANSWER TO BE FILED. THE DATE OF THAT SUMMARY JUDGEMENT WAS 2/23/87. THAT WAS PRIOR TO THE HEARING ON MARCH 16TH AND 17TH, BUT IT WAS AFTER THE DEPOSITIONS. IT HAD BEEN FILED ON THE

23RD OF FEBRUARY, 1987, WHICH WAS DURING THE PENDENCY OF MR. MCAFFE'S TENURE ON THE BOARD. I FOUND ONLY ONE CASE WHERE MR. DRAPER, HIMSELF, WAS SIGNED ON THE CASE. THAT WAS THE CASE OF MILLARD SCOTT AND INA SCOTT VERSUS DOVER ELEVATOR COMPANY WITH A CLAIM OF $250,000 PLUS $100,000, SIGNED BY JACK DRAPER, HIMSELF. I FOUND --

Q. HAS THAT BEEN FILED?

MR. HUNT: THAT'S PART OF IT.

A. THAT HAD JACK DRAPER'S SIGNATURE ON CORRESPONDENCE IN THE FILE AS WELL AS PLEADINGS. ALL OF THE REST OF THE CASES WERE OF THE DRAPER FIRM, EITHER BY ASSOCIATES TOM SCOTT --

MR. DRAPER: HE WON'T CONTINUE TO BE YOUR FRIEND, GENERAL RAMSEY, IF YOU REFER TO HIM AS AN ASSOCIATE --

A. I DON'T KNOW THE STATUS. RICK POWERS IS IN THERE AS AN ASSOCIATE OR PARTNER, AND ANOTHER THAT OCCURRED FREQUENTLY. THERE WAS ONLY ONE ACTUAL JACK DRAPER SIGNED DOCUMENT.

Q. WHAT DO THESE CASES THAT YOU FOUND, WHAT DO THEY AMOUNT TO IN PECUNIARY VALUE, JUST ADDING UP THE ADDENDUM OR REQUEST?

A. THE TOTAL AMOUNT ADDENDUM IS $2,347,750 THAT IT WAS ABLE TO FIND. WE QUIT AFTER FOUR HOURS. IT WAS A TEDIOUS PROCESS. THERE ARE PROBABLY OTHERS THERE.

Q. WERE THESE CASES FILED IN THE CONCURRENT JURISDICTION COURTS WITH JAMES "BUDDY" SCOTT OR HIS BROTHER-IN-LAW?

A. WE ONLY LOOKED IN THAT COURT. THERE ARE OTHER CASES IN JUDGE MEREDITH'S

COURT THAT MAY PERCOLATE UP TO THE COURT OF JUDGE SCOTT, INCLUDING, AS A MATTER OF FACT, A CASE WHERE -- SUBSEQUENT TO ALL OF THIS -- MY SON HAD AN AUTOMOBILE ACCIDENT AND FILED A SUIT WHICH WAS REPRESENTED BY THE DRAPER FIRM. AND IT WAS SETTLED IN THE TRIAL JUSTICE COURT BEFORE IT COULD BE APPEALED UP TO SCOTT'S COURT.

Q. HAD YOU KNOWN OF THESE MATTERS, WOULD THAT HAVE PROBABLY GIVEN YOU A DECISION MAKING CHANCE TO ASK ONE OF THESE MEMBERS TO RESCUE HIMSELF?

A. IF THIS HAD BEEN DISCLOSED TO US PRIOR TO THE HEARING, I PROBABLY WOULD HAVE MADE A SIMILAR DECISION TO THE ONE WHICH WE DID MAKE WHEREIN MR. NOE RESULTED AS A MEMBER OF THE BOARD.

Q. WAS THAT ON MARTHA MEARES?

A. YES.

Q. WAS THERE A CONFLICT THERE?

A. WELL, THERE WAS -- IT WAS NEVER DECIDED THAT THERE WAS BECAUSE OF THE FACT WE WERE ACQUAINTED WAS ENOUGH TO CAUSE A RECUSAL, VOLUNTARILY, BY HER FROM THE PANEL.

Q. OKAY. YOU MENTIONED THAT YOU THOUGHT THAT THIS JUDGEMENT OF THIS HEARING PANEL WAS A BIT HARSH?

A. THAT WAS THE COMMUNITY'S FEELING, INCLUDING THE EDITOR OF THE OAK RIDGER.

Q. WAS THAT YOUR OPINION ALSO?

A. YES. I WAS ASTOUNDED.

Q. ARE YOU AWARE OF -- JUST COMPARISON-WISE, SO THE PANEL CAN WEIGH IT --

MR. DRAPER: I AM GOING TO RULE THAT THAT DOESN'T HAVE A THING TO DO WITH THE MOTION TO VACATE BASED ON CONFLICT OF INTEREST OR PECUNIARY INTEREST.

Q. YOU WON'T LET US -- IF IT PLEASE THE COURT, YOU WON'T LET US GO INTO OTHER CASES THAT HAVE BEEN DECIDED BY HEARING PANELS JUST TO GIVE AN EYE INDICATOR OF WHAT THEY'VE AWARDED?

MR. DRAPER: IT WOULDN'T BENEFIT ME AS A MEMBER OF THE HEARING PANEL AT ALL, BECAUSE EACH CASE HAS TO BE TRIED AND DETERMINED ON ITS OWN PECULIAR FACTS. NOW, THE OTHER MEMBERS OF THE PANEL CAN EXPRESS

THEMSELVES. I DON'T SIT HERE TO MAKE ULTIMATE RULING. WE WILL VOTE, IF THEY CARE TO HEAR IT.

MR. NOE: I DON'T WANT TO HEAR ANY MORE RABBIT CHASE. LET'S GET TO THE POINT, IS THE WAY I FEEL ABOUT IT.

Q. ARE YOU AWARE OF THE DECISION OF MURPHY THAT CAME DOWN ON MARCH 3RD OF '87 BY THE SUPREME COURT?

A. WELL, I'M AWARE OF THE PORTION OF IT THAT DEFINES PECUNIARY INTEREST.

Q. NAMELY PAGE 12 -- DO YOU HAVE A COPY OF THAT OPINION?

MR. HUNT: NO, I DON'T.

Q. THERE IT IS. THAT'S YOUR COPY. MORE PARTICULARLY, I WOULD LIKE TO READ

FROM PAGE 12 AT LINE 6, THE INTERESTS WHICH DISQUALIFIES A JUDGE IS A DIRECT PECUNIARY INTEREST OR ONE WHICH MIGHT INVOLVE SOME INDIVIDUAL RIGHT IN THE SUBJECT MATTER OF THE LITIGATION, WHEREBY LIABILITY OR PECUNIARY GAIN MUST OCCUR ON THE EVENT OF A SUIT. OF COURSE, THERE ARE OTHER MATTERS BROUGHT UP IN THIS DECISION, BUT I JUST WANTED TO BRING THAT PORTION OUT. THAT'S A CASE THAT WE HAVE A SLIP OPINION HERE, THE PRESS COPY THAT CAME DOWN ON MARCH 3RD, '87.

Q. MORE PARTICULARLY, ON THE CULBERTSON MATTER, THE BOARD FOUND SOME INTERESTING MATTER IN THERE AND THEY COMMENTED ON IT. WERE YOU OF THE BELIEF THAT YOU WERE UNDER ARREST AT THE TIME?

A. OH, I WAS UNDER ARREST. TWO ARMED GUARDS CAME AND GOT ME OUT OF MY

OFFICE AND TOOK ME INTO COURT ON OCTOBER 16, 1979. THAT'S UNDISPUTED.

Q. WHO WAS THE VICTIM OF THE ARREST?

MR. DRAPER: MR. FOGLESONG, YOU'RE JUST RETRYING THE BASIC CASE. THIS IS A MOTION THAT CHALLENGES THE PANEL'S DECISION BASED UPON CONFLICT OF INTEREST AND PECUNIARY INTEREST. AND I THINK THAT'S WHAT YOU SHOULD LIMIT THE HEARING TO.

A. I REALIZE I'M ON THE STAND, BUT I WONDER IF I MIGHT CONSULT WITH MY ATTORNEY.

MR. DRAPER: CERTAINLY.

(OFF THE RECORD.)

(BACK ON THE RECORD.)

Q. WHY WAS IT THAT YOU FELT THAT THESE LAWSUITS AND THE MONIES THAT WERE INVOLVED IN THESE LAWSUITS MIGHT AFFECT THE HEARING PANEL'S THINKING?

A. THE ONLY EXPLANATION I CAN THINK OF FOR THE HARSHNESS OF THE VERDICT, IN VIEW OF THE OPINION ITSELF, WHICH CONTAINS MAJOR FACTUAL ERRORS -- TO WIT, RECITES THE CULBERTSON EPISODE AS THE BASIS FOR THE SIX-MONTH JUDGMENT, IN CONJUNCTION WITH THE 1983 GRAND JURY LIST INCIDENT AS A PATTERN, BUT CALLS IT THE 1985 ISSUE. IN OTHER WORDS, THE HEARING PANEL FACTUALLY CONFUSED THE CULBERTSON 1979 ARREST SITUATION WITH THE '85 CAPIAS SITUATION. AND ON THAT FACTUAL ERROR, WHICH TO ME INDICATED A LACK OF UNDERSTANDING OF THE FACTUAL SCENARIO IN THE CASE AND THEN CAME OUT WITH A HARSH JUDGEMENT, I CAN ONLY EXPLAIN THAT BY A

PREJUDGED STATUS IN THE MIND OF THE PANEL. IN OTHER WORDS, THEY KNEW WHAT THEY WERE GOING TO DO AND DIDN'T LOOK AT THE FACTS CLOSELY ENOUGH TO GET THE '79 INCIDENT STRAIGHT FROM THE '85 INCIDENT.

Q. IN THE MOTION TO DISCLOSE THE CONFLICTS OF INTEREST, HAVE YOU RECEIVED ANY RESPONSE TO THAT BY ANY BOARD MEMBER?

A. I'M SORRY.

Q. YOU ALSO FILED A MOTION TO DISCLOSE THE TOTALITY OF THE CONFLICT --

A. WELL, I FOUND 14 CASES, BUT I ONLY LOOKED FOR YOUR HOURS. IT'S SO TEDIOUS TO FIND THOSE THAT I ASKED FOR MORE IN THE MOTION. I HAVE HAD NO RESPONSE TO THAT YET. I HAVE NO IDEA WHAT THE TOTAL MAGNITUDE OF THE PECUNIARY INTEREST OF THE THREE BOARD MEMBERS MIGHT

BE IN THE SEVENTH JUDICIAL DISTRICT. I THINK THIS IS ENOUGH. I DON'T HAVE ANY INCLINATION TO WASTE ANY MORE TIME LOOKING FOR THEM. THEY'RE HONORABLE MEN AND WILL TELL US.

Q. YOU MAY ASK.

CROSS EXAMINATION

BY MR. HUNT:

Q. ARE THESE THE ONLY THINGS THAT YOU HAVE FOUND THAT WOULD INDICATE ANY PREJUDICE OR PREJUDGMENT BY THE HEARING PANEL?

A. IF YOU ARE ASKING ME TO GO BEYOND THE SCOPE OF THE MOTION WE FILED, I WOULD HAVE TO THINK A LONG TIME BEFORE ANSWERING THAT QUESTION. WE CHOSE ONE THAT WE THOUGHT WOULD ACCOMPLISH THE RESULT. BUT

IT Wouldn't FORECLOSE THE POSSIBILITY OF OTHER THINGS, NO.

Q. BUT AT THIS TIME, THIS IS THE ONLY THING UPON WHICH YOU RELY?

A. THE FACTUAL ERROR, IN CONJUNCTION WITH THE CONFLICT OF INTEREST OR PECUNIARY INTEREST, TOGETHER, MAKE AN INFERENCE OR PREJUDICE.

Q. YOU MENTIONED EARLIER THAT YOU'RE A FRIEND OF TOM SCOTT?

A. I HAVE MANY FRIENDS AMONG THE KNOXVILLE BAR AND ELSEWHERE.

Q. AND MR. SCOTT IS ONE OF YOUR FRIENDS?

A. I WOULD HOPE HE WOULD SAY SO, TOO.

Q. HE'S A MEMBER OF MR. DRAPER'S FIRM?

A. YES.

Q. AND YOU ALSO MENTIONED -- AND I THINK IT WAS BROUGHT OUT THAT THERE HAS BEEN AT LEAST A PRIOR REQUEST OF RECUSAL BY YOU BEFORE THE HEARINGS BEGAN?

A. WHEN IT CAME TO MY ATTENTION THAT SOMEBODY ON THE PANEL MAY HAVE SUCH A REASON FOR DISQUALIFICATION OR RECUSAL, I DID EXERCISE THAT OPTION. I WAS FORECLOSED, HOWEVER, FROM EXERCISING THAT OPTION WITH RESPECT TO THE PANEL, BECAUSE IT DID NOT KNOW THE FACTS. AND THEY DID NOT DISCLOSE THEM.

Q. YOU MENTIONED ALSO -- YOUR SON'S CASE NEVER WENT TO JUDGE SCOTT'S COURT?

A. THAT ALL OCCURRED SUBSEQUENT TO THE RENDERING OF THIS DECISION ON APRIL THE 6TH. THE ACCIDENT ITSELF OCCURRED ON MARCH 13TH, BUT SUIT WASN'T FILED UNTIL AFTER I FILED THAT MOTION.

Q. IT WAS SETTLED IN TRIAL COURT?

A. WE WON IT IN A TRIAL.

Q. BUT IT WAS NOT BEFORE JUDGE SCOTT?

A. NO. IT WOULD HAVE GONE TO HIM HAD IT BEEN APPEALED.

Q. WHO WAS THE JUDGE?

A. JUDGE MEREDITH.

Q. I HAVE NOTHING FURTHER.

MR. FOGLESONG: DOES THE PANEL HAVE ANY QUESTIONS?

MR. DRAPER: HAVE EITHER OF YOU LOOKED FOR OR FOUND ANY CASE THAT MIGHT SPEAK TO THE PROPOSITION AS TO WHETHER OR NOT BEING AN ATTORNEY FOR A LITIGANT IN THIS CONTEXT WOULD CONSTITUTE A CONFLICT OF INTEREST OR PECUNIARY INTEREST?

A. THE MURPHY CASE IS THE ONLY ONE I CAN COME UP ON.

MR. DRAPER: ALL THIS DOES IS GIVE US A TEXTBOOK DEFINITION OF THE TYPE OF INTEREST THAT WILL DISQUALIFY A JUDGE. I THINK THE TYPE OF INTEREST THAT WOULD DISQUALIFY A JUDGE WOULD DISQUALIFY US, AS WELL.

Q. RIGHT. WE HAVE THE MURPHY CASE. THERE ARE OTHER PAGES IN THE MURPHY CASE, BUT I THOUGHT MORE PARTICULARLY THAT WAS-- I THINK THE APPEARANCE OF IMPROPRIETY, IF NOTHING ELSE, IS PROBABLY THE STRONGEST THING THAT WE HAVE HERE, PLUS THERE CAN BE A FINANCIAL INTEREST FROM THESE CASES.

MR. DRAPER: THE RESPONDENT HAS TESTIFIED ABOUT AN ALLEGED FACTUAL ERROR IN THE OPINION OF THE FINDINGS IN THE JUDGEMENT OF THE PANEL. HAS THAT BEEN INCLUDED IN THIS MOTION IN ANY RESPECT? I DIDN'T FIND IT. DID I OVERLOOK IT?

MR. FOGLESONG: IT IS NOT IN THE MOTION.

MR. DRAPER: OKAY. DO EITHER ONE OF YOU HAVE ANYTHING ELSE YOU WANT TO SAY OR PRESENT TO THE PANEL.

MR. RAMSEY: IN ALL DUE RESPECT, THE REASON WHY I HAVE FILED THIS MOTION AND URGED MY ATTORNEY TO ARGUE IT -- SOMEWHAT AGAINST HIS WILL, I MIGHT ADD -- IS THAT IT'S JUST WRONG FOR THE THREE OF YOU DISTINGUISHED GENTLEMEN TO BE WRITING SANCTIMONIOUS OPINIONS ABOUT MY ETHICS WHILE SITTING ON 2.3 MILLION DOLLARS WORTH OF PECUNIARY INTERESTS IN THE COURT WITH THE ONLY COMPLAINT AGAINST ME. AND IT'S JUST NOT RIGHT. IT SHOULD BE SET ASIDE.

MR. DRAPER: WELL, I ASK YOU THE SAME QUESTION I ASKED THE LAWYERS. DO YOU HAVE A CASE FROM SOME APPELLATE COURT THAT SAYS BEING AN ATTORNEY OF RECORD IN A LAWSUIT AUTOMATICALLY MEANS THE LAWYER HAS A PECUNIARY INTEREST IN THE CASE. THAT

IS NEW LAW TO ME. I WOULD LIKE TO SEE AND OPINION ABOUT IT.

MR. RAMSEY: YOUR HONOR, I DON'T HAVE A CASE. I HAVE A DISCIPLINARY RULE IN THE -- RULE EIGHT THAT SAYS THAT SUCH INTEREST MUST BE DISCLOSED. IT DOESN'T SAY THAT ONCE DISCLOSED IT WOULD BE A CONFLICT OF INTEREST OR EVEN A DISQUALIFYING FACT. IT REQUIRES DISCLOSURE. IF THAT HAD HAPPENED IN THIS CASE, THEN DUE PROCESS WOULD HAVE BEEN SATISFIED. I WOULD HAVE HAD AN OPTION TO WAIVE THAT PECUNIARY INTEREST OR DO WHAT I DID WHEN I HAD ANOTHER SITUATION SIMILAR.

MR. DRAPER: GENERAL RAMSEY, THE PROBLEM I HAVE WITH THIS -- AND I'M NOT HERE TO ARGUE WITH YOU AND DON'T INTEND TO PURSUE THIS ANY FURTHER -- YOUR PREMISE IS THAT WE, AS

REASON OF BEING -- BY VIRTUE OF BEING COUNSEL OF RECORD IN VARIOUS CASES, HAVE A PECUNIARY INTEREST IN THOSE LAWSUITS. THAT IS THE ISSUE THAT TROUBLES ME. RIGHT NOW, I AM PERSUADED AND HAVE ALWAYS BEEN PERSUADED THAT, AS AN ATTORNEY, I DON'T HAVE A PECUNIARY INTEREST IN A LAWSUIT. I DON'T BELIEVE I DO. I NEVER CONSIDERED THAT I DID.

MR. RAMSEY: I CAN ONLY BE RHETORICAL, AS WE DID IN THIS MOTION, IF YOU WERE IN THE PRACTICE OF CRIMINAL LAW AND HAD A CASE WHERE YOUR CLIENT WAS BEING PROSECUTED BY DISTRICT ATTORNEY GENERAL RAMSEY, I AM SURE YOU WOULD HAVE FELT UNCOMFORTABLE SITTING ON A HEARING BOARD WHERE MY STAKE AND THE PUBLIC'S STAKE IN MY OPPORTUNITY TO CONTINUE AS DISTRICT ATTORNEY, MY LAW LICENSE, IN OTHER

WORDS, WAS AT STAKE. YOU PROBABLY WOULDN'T HAVE DONE THAT. I AM SURE YOU WOULD HAVE STEPPED ASIDE AND SAID FIND AN ATTORNEY FROM WEST TENNESSEE WHO DOESN'T HAVE CLIENTS PROSECUTED BY RAMSEY BECAUSE OF THE CLEAR OPPORTUNITY TO EITHER RENDER A JUDGEMENT THAT I WOULD LIKE AND THEREBY PERHAPS HAVE A REASON TO BE LENIENT IN DEALING WITH YOUR CLIENT-- OR THE CONTRARY; A RETRIBUTIVE TYPE OF THING. YOU PROBABLY WOULD HAVE DONE THAT. THERE IS NO DIFFERENCE BETWEEN THAT AND SITTING IN JUDGEMENT ON ME, WHERE THE ONLY COMPLAINANT IS THE JUDGE WHO CAN RENDER A SUMMARY JUDGEMENT WITHOUT AN ANSWER HAVING TO BE FILED BY YOUR FIRM IN A $250,000 CASE. THE CASE WAS FILED ON THE 23RD OF FEBRUARY, 1987 -- NO, THAT'S WHEN THE JUDGEMENT WAS FILED, WHICH WAS JUST PRIOR TO OUR HEARING. THE CASE

WAS FILED BY ATTORNEY CHARLES GORDON ON JULY -- IN JULY OF 1985 AND PENDED DURING THE ENTIRE TIME OF MR. MCAFFE'S TENURE AS A PANELIST IN MY CASE AND WAS DISMISSED ON THE 23RD OF FEBRUARY, WHICH WAS LESS THAN A MONTH BEFORE THE HEARING WHERE HE WAS TO DETERMINE MY FATE OR JUDGE SCOTT'S COMPLAINT AGAINST ME. AND JUDGE SCOTT SIGNED THE ORDER. THERE IS NO DIFFERENCE IN THE APPEARANCE OF PROPRIETY BETWEEN THAT AND REPRESENTING CLIENTS BEFORE ME AS A PROSECUTOR. BUT YOU DIDN'T HAVE THAT OPPORTUNITY AND I DIDN'T HAVE THE OTHER OPPORTUNITY, BECAUSE YOU DON'T DO CRIMINAL LAW AND I DON'T DO CIVIL LAW.

MR. DRAPER: ANYTHING ELSE.

MR. HUNT: NOTHING FURTHER.

MR. DRAPER: ALL RIGHT, THIS HEARING THEN IS CONCLUDED. AND THE PANEL WILL CONSIDER THIS AND I THINK WE'RE OBLIGED TO FILE SOME WRITTEN RULING ON IT BACK TO THE BOARD OF PROFESSIONAL RESPONSIBILITY, WHICH WE WILL.

MR. FOGLESONG: M A Y I G E T SOMETHING CLARIFIED? IT WOULD BE-- THE TIMES FOR APPEAL, MAYBE YOU COULD RULE ON THAT.

MR. HUNT: MY POSITION IS -- AND I WOULD STIPULATE IT FOR THE RECORD-- THAT YOU HAVE 60 DAYS FROM THE DATE THEY RULE. IT'S LIKE A MOTION FOR NEW TRIAL. SIXTY DAYS FROM THE DATE THEY FILED THEIR OPINION.

MR. FOGLESONG: ON THIS. IT

WOULDN'T RUN FROM THE DATE OF THE ORIGINAL OPINION.

MR. HUNT: NO. AND, FOR THE RECORD, I WON'T RAISE THAT ISSUE AT ANY POINT UNLESS AT ANY POINT UNLESS YOU GO BEYOND THE 60 DAYS AFTER THEIR OPINION.

MR. FOGLESONG: YOU STIPULATE TO THAT?

MR. HUNT: YES.

MR. DRAPER: ALL RIGHT, THANK YOU.

(END OF PROCEEDINGS).

# C E R T I F I C A T E

STATE OF TENNESSEE:

COUNTY OF KNOX:

I, BETSY BROWN, COURT REPORTER AND NOTARY PUBLIC AT LARGE, DO HEREBY CERTIFY THAT I REPORTED IN MACHINE SHORTHAND THE ABOVE TESTIMONY, AND THAT THE FOREGOING PAGES, NUMBERED FROM 1 TO 24, WERE TYPED UNDER MY PERSONAL SUPERVISION AND CONSTITUTES A TRUE AND ACCURATE RECORD OF THE PROCEEDINGS.

I FURTHER CERTIFY THAT I AM NOT AN ATTORNEY OR COUNSEL FOR ANY OF THE PARTIES, NOR A RELATIVE OR EMPLOYEE OF ANY ATTORNEY OR COUNSEL, NOR FINANCIALLY INTERESTED IN THE ACTION.

WITNESS MY HAND AND OFFICIAL SEAL THIS THE 3RD DAY OF NOVEMBER, 1987.

BETSY BROWN

COURT REPORTER AND

NOTARY PUBLIC AT LARGE

MY COMMISSION EXPIRES:

9-18-89

C E R T I F I C A T E

STATE OF TENNESSEE:

COUNTY OF KNOX:

I, BETSY BROWN, COURT REPORTER AND NOTARY PUBLIC AT LARGE, DO HEREBY CERTIFY THAT I REPORTED IN MACHINE SHORTHAND THE ABOVE TESTIMONY, AND THAT THE FOREGOING PAGES, NUMBERED FROM 1 TO 24, WERE TYPED UNDER MY PERSONAL SUPERVISION AND CONSTITUTES A TRUE AND ACCURATE RECORD OF THE PROCEEDINGS.

I FURTHER CERTIFY THAT I AM NOT AN ATTORNEY OR COUNSEL FOR ANY OF THE PARTIES, NOR A RELATIVE OR EMPLOYEE OF ANY ATTORNEY OR COUNSEL, NOR FINANCIALLY INTERESTED IN THE ACTION.

WITNESS MY HAND AND OFFICIAL SEAL THIS THE 3RD DAY OF NOVEMBER, 1987.

/s/ Betsy Brown

BETSY BROWN

COURT REPORTER AND

NOTARY PUBLIC AT LARGE

MY COMMISSION EXPIRES:

9-18-89

**Exhibit J**

FILED June 11, 1987
BOARD OF PROFESSIONAL
RESPONSIBILITY OF THE
SUPREME COURT OF
TENNESSEE
/s/ Mary Woodroof
Executive Secretary

**IN DISCIPLINARY DISTRICT II**
**of the**
**BOARD OF PROFESSIONAL RESPONSIBILITY**
**of the**
**SUPREME COURT OF TENNESSEE**

**IN RE: James Ramsey Docket No. 85-252-2**

**ORDER DENYING RESPONDENT'S MOTION TO VACATE**

In this case the Respondent has filed a Motion to Vacate Panel Decision and Motion to Disclose Totality of Conflict of Interest. This Motion was filed with the Board on April 21, 1987. The following day, Respondent filed an Addendum to his Motion.

A hearing was scheduled and the Motion was heard by the Panel on Friday, May 29, 1987. The same Panel members, parties,

and counsel appeared at the Motion hearing as were present during the hearing which was conducted on March 16 and 17, 1987.

The thrust of the Respondent's Motion is that some or all of the Panel had a conflict of interest, as well as a pecuniary interest which could be adversely affected by reason of their (or members or associates in their firms) being counsel of record in various civil cases pending or since filed in the Court presided over by Judge James B. Scott. In addition, Respondent requested the Panel to provide a complete list of all cases which they or members of their firms had pending in Judge Scott's Court.

Dealing first with the request of Respondent that the Panel provide a list of cases as described above, the Panel has not been disposed and is not now disposed

to honor or respond to this request for the simple reason that if serving as counsel in civil cases in Judge Scott's Court was or is legally sufficient to create a conflict of interest or constitute a pecuniary interest, then it matters not if it is one (1) case or fifty (50) cases. The disqualification basis would exist and would have to be recognized.

The Panel does not believe and has not found or been shown any court decision or other legal counsel in civil cases in the Court presided over by the Judge who filed the disciplinary complaint constitutes a conflict of interest or a pecuniary interest which could be affected by the Panel's decision. The Panel knows that there was not any partiality in fact present in its hearing and deciding this case. Moreover, it does not believe that

the appearance of partiality is created by some or all of the Panel or members of their firms being involved as attorneys in civil cases in Judge Scott's Court.

For these reasons the relief sought in Respondent's Motion is denied.

This 10th day of June, 1987.

/s/ Jack B. Draper
Jack B. Draper, Chairman

/s/
Joe Mont McAfee

/s/
Ralph H. Noe, Jr.

**Exhibit K**

6-30-87

IN THE ANDERSON COUNTY CHANCERY COURT
AT CLINTON, TENNESSEE

JAMES N. RAMSEY
PETITIONER

V. Civil No. _____

BOARD OF PROFESSIONAL
RESPONSIBILITY OF THE
SUPREME COURT OF TENNESSEE
The Oaks Tower
Suite 405, 1101 Kermit Drive
Nashville, Tennessee

PETITION FOR THE WRIT OF CERTIORARI

Petitioner James Nelson Ramsey, by and through his attorney James E. Foglesong, petitions this Honorable Court as follows:

1. The Jurisdiction of this Court is based upon Tennessee Supreme Court Rule 9, Section 1.3.

2. Petitioner resides in Anderson County, Tennessee where he is the serving District Attorney General for the 7th

Judicial District, Anderson County, Tennessee, having been elected to the position pursuant to Article VI, Section 5 of the Tennessee Constitution. Petitioner is unimpeached and is not accused of any act which is a crime. While Petitioner is a citizen of the United States of America and the State of Tennessee and is licensed to practice law in Tennessee, he is prohibited from the practice of law by Tennessee Code Annotated 8-7-104.

3. Petitioner was the Respondent in a petition for discipline filed by the Board of Professional Responsibility in Disciplinary District II, No. 85-252-2. This is a civil action seeking to review the decision of the Defendant as affirmed by order dated June 11, 1987. The decision and the subsequent order are attached as Collective Exhibit 1.

4. Rule 8 of the Tennessee Supreme Court, The Code of Professional Responsibility, is facially unconstitutional and violates Petitioner's right to due process of law and equal protection of the law as guaranteed by the 14th Amendment to the U.S. Constitution, in the following respects: DR 1-102(A)(5), DR 1-102(A)(6), and DR 7-106(C)(6), the primary provisions under which Petitioner is charged, are void for vagueness. Terms such as "conduct that is prejudicial to the administration of justice", "conduct that adversely reflects on his fitness to practice law", and "undignified or discourteous conduct" do not give fair warning of the conduct which will be subject to disciplinary action. Such vaguely worded rules permit the finder of fact to define virtually any

act as misconduct, making possible retaliation against attorneys such as Petitioner who have exercised their First Amendment right to criticize the judiciary. Such rules give the trier of fact unbridled discretion in interpreting the rules. These rules have not been, and probably cannot be, sufficiently narrowed by judicial interpretation.

5. Rule 9 of the Tennessee Supreme Court, Disciplinary Enforcement, is facially unconstitutional and violates Petitioner's right to due process of law and equal protection of the law as guaranteed by the 14th Amendment to the U.S. Constitution, in the following respects:

A. Rule 9, Sections 5 and 6 present a scheme whereby the Board of Professional Responsibility

selects both the disciplinary counsel who prosecutes disciplinary actions and the three members of the hearing committee which tries charges of misconduct and both disciplinary counsel and the hearing committee report to the Board. Rule 9, Section 8.1 provides that the Board makes the determination whether or not a proceeding will be instituted before a hearing committee. The Board (an agency of the Tennessee Supreme Court) controls prosecutorial functions and adjudicative functions, thereby depriving those accused in disciplinary proceedings of an independent and impartial trier of fact. The American system of jurisprudence is adversarial with an impartial judge. Any

inquisitorial system which blurs the prosecutorial and judicial function is constitutionally flawed.

B. Rule 9, Section 24 provides that a respondent attorney who incurs a judgment against him (including suspension, disbarment or reprimand) shall be assessed not only the costs of the proceedings but also expenses of the hearing committee and attorney's fees for disciplinary counsel who prosecuted the complaint. There is no reciprocal provision for paying the legal fees and expenses of the respondent attorney when he is the prevailing party. Such an arrangement is unprecedented in legitimate American jurisprudence

and is clearly designed to and does chill an attorney's exercise of his right to a hearing.

6. Rule 8 and Rule 9 of the Tennessee Supreme Court are unconstitutional as they have been applied to Petitioner, in derogation of his rights and obligations under the Executive Branch of government and in violation of the principal of Separation of Powers, and violate his right to due process of law and equal protection of the law as guaranteed by the 14th Amendment to the U.S. Constitution and his right to freedom of speech as guaranteed by the First Amendment to the U.S. Constitution in the following respects:

A. Vaguely worded disciplinary rules have been used by the Board of Professional Responsibility to

penalize Respondent for statements made by him in his official capacity as a District Attorney and as a private citizen in the exercise of his constitutional right to free speech because such open, truthful statements have angered and embarrassed the local state judges and system of justice.

B. Rule 8 and Rule 9 do not give due notice that they govern the conduct of District Attorneys. Neither Rule states that it is applicable to District Attorneys, who are not mere lawyers, but constitutional officers. Rule 9, Section 1.1 states that disciplinary rules are applicable to those who "practice law in this State" and the statutory law

prohibits District Attorneys from practicing law. TCA 8-7-104. Rule 9, Section 18 specifies that disbarred or suspended attorneys must give notice to their "clients" and a District Attorney has no clients.

C. The Constitution of the State of Tennessee specifies impeachment by the Legislature as the only method of removing a popularly elected District Attorney. This creates a vested right in the office in Petitioner absent impeachment, a right protected by the 14th Amendment to the U.S. Constitution and also gives Petitioner standing to assert the right of the people who elected him to his serves as District Attorney unless terminated by

impeachment. Since Rule 8 and Rule 9 were not enacted to apply to District Attorneys, these rules make no provision to safeguard the office of District Attorney from infringement by the judiciary, including the Board of Professional Responsibility, once a suspension or disbarment of the District Attorney is declared by the judiciary.

D. Petitioner was denied an impartial trier of fact at his administrative hearing because two members of the three-member hearing committee belonged to law firms which had over one million dollars in lawsuits pending in the court of Judge James B. Scott. Judge Scott is the Complainant who initiated the

Board proceedings and was the chief witness testifying before the panel against Petitioner. These two panel members did not disclose these interests before the hearing and denied a motion to vacate their judgement when later confronted with their lawsuits in Judge Scott's Court.

E. Prosecuting Respondent for incidents which have previously been adjudicated by the Board in Respondent's favor violates due process. This includes all incidents occurring before 1982.

7. The Board does not have jurisdiction over Petitioner since he is a District Attorney subject to removal only by legislative impeachment.

8. The Board's action is barred by laches and res judicata.

9. Respondent has not violated any disciplinary rule of Rule 8, Tennessee Supreme Court.

WHEREFORE, The Petitioner asks the following relief:

1. That a Writ of Certiorari be issued to Respondent, Board of Professional Responsibility, requiring it to produce the record in this cause before this Court;

2. That a full hearing be scheduled as quickly as possible in Anderson County, Tennessee;

3. That the judgment of the Board against him suspending his license to practice law be reversed and the case dismissed;

4. That he have such other relief to which he is entitled.

Respectfully submitted, this the 30th day of June, 1987.


/s/
James N. Ramsey,
Petitioner

P.O. Box 3031
Oak Ridge, TN 37830-3031
(615) 457-5640

/s/
James E. Foglesong
Attorney for Petitioner
Third Floor, 612 Gay Street
Knoxville, TN 37902
(615) 525-4158


THIS IS THE FIRST APPLICATION FOR EXTRAORDINARY RELIEF IN THIS CAUSE.

COST BOND

I, the undersigned, do hereby acknowledge myself as surety in this cause not to exceed Five Hundred ($500.00) dollars.

This the 30th day of June, 1987.

/s/
James N. Ramsey

STATE OF TENNESSEE )
COUNTY OF KNOX )

JAMES N. RAMSEY, after first being duly sworn according to law, makes oath that the facts contained in his foregoing Petition are true to the best of his knowledge, information and belief. That the said Petition is not made out of levity or by collusion with the Defendant,

but in sincerity and truth for the causes mentioned in this Petition.

/s/
James N. Ramsey

---

Sworn to and subscribed before me this 30th day of June, 1987.

/s/ Sandra Reed
Notary Public

My Commission Expires: 1-27-90

---

**Exhibit L**

IN THE ANDERSON COUNTY CHANCERY COURT
AT CLINTON, TENNESSEE

JAMES N. RAMSEY
PETITIONER

VERSUS
Civil No. 2736-7-CM

BOARD OF PROFESSIONAL
RESPONSIBILITY OF THE
SUPREME COURT OF TENNESSEE

# TRIAL BRIEF
# OF PETITIONER JAMES N. RAMSEY

Petitioner James N. Ramsey respectfully submits the following trial brief in support of his case before this honorable Chancery Court.

## STATEMENT OF THE CASE:

Shortly after Petitioner James N. Ramsey (Respondent below) was elected District Attorney in Anderson County, the Circuit Court Judge Buddy Scott began filing complaints against him with the

Board of Professional Responsibility. Each and every allegation in the Petition, paragraphs 3 through 12, resulted from complaints filed with the Board by Judge Buddy Scott and no one else. None of the other judges or courts mentioned in the Petition for Discipline have filed complaints against respondent.

With respect to the incidents alleged in paragraph 4 (door slamming incident) and paragraph 6 (failure to answer judge's question regarding plea-agreement process) of the Petition For Discipline, the Board was "pleased to advise" this Petitioner by letter of June 18, 1980 that those complaints were "dismissed" at the regular meeting of the Board on June 6, 1980 and therefore the files were "closed". The incident cited in paragraph 9 (wherein Petitioner supplied information to a grand jury) was also concluded on

June 30, 1982 by court decision which did not follow the board's recommendation. Incidents alleged in paragraph 5 (statement in press on February 23, 1979), paragraph 7 (statement in press October 24, 1979), paragraph 8 (letter reported in press March 30, 1981) and paragraph 10 (statement in press December 3, 1981) are matters upon which the Board took no action when they arose some four to six years prior to the filing of the Petition for Discipline. The Board took no action prior to filing of the Petition regarding the incident cited in paragraph 11 (Failure to answer question about grand jury) which occurred in 1983. This leaves paragraphs 3 and 12, both of which refer to the same incident wherein Respondent (Petitioner herein) was fined and served ten days in jail because Judge Scott ordered him to prepare a report and the

judge was not satisfied with the report prepared by Respondent.

STATEMENT OF FACTS:

Judge Buddy Scott was District Attorney in Anderson County immediately before he was appointed by the governor to be circuit judge, filling a vacancy caused by the death of the honorable Judge Sidney Davis. This left Buddy Scott's Assistant District Attorney, Mike Lawson, as acting District Attorney for a short time before the next election. James Ramsey and Mike Lawson both sought the Democratic nomination for District Attorney and James Ramsey won the nomination and the election. Judge Scott, who handles the criminal cases in the county, had wanted Mike Lawson, his friend, to be District Attorney. Judge Scott asked Jim Ramsey to

keep the Criminal Investigator (Ken Caldwell) and others who had worked for himself and Lawson on the District Attorney's staff because "they were the best people possible for the job" and so Ken Caldwell could build his retirement. Judge Scott was very close to Ken Caldwell, who he says was "like a father" to him. James Ramsey for many reasons decided not to keep Ken Caldwell as investigator and this was the beginning of and a major source of Judge Scott's animosity.

After the election Judge Scott told James Ramsey that he expected full and open communication from the District Attorney's Office and he attempted to discuss defendants and pending cases with him. When this occurred, the District Attorney told Judge Scott that there would be no ex parte communications about

pending cases. After this, the relationship with the Judge steadily deteriorated as he used his contempt powers and complained to the Board about matters that can only be described as petty.

The door slamming incident (paragraph 4 of petition) occurred after Judge Scott refused to follow Rule 12 of the Rules of Criminal Procedure requiring pretrial rulings on suppression motions and then misrepresented the District Attorney's position to the jury. In leaving the courtroom, the District Attorney was preoccupied and did not take care to close the door quietly after the jury had been dismissed.

The failure to answer a question about a plea agreement (paragraph 6 of Petition) occurred when Judge Scott had the District

Attorney arrested and physically brought into the Courtroom by the Sheriff (a fact admitted in Judge Scott's complaint to the board) and the District Attorney, who was in custody, was asserting his constitutional right to remain silent--a right which Judge Scott refused to recognize. Judge Scott jailed Petitioner for his silence. The District Attorney dropped the appeal in an effort to end the dispute.

The incident related in paragraph 9 of the petition occurred when the Respondent (Petitioner herein) gave members of a grand jury truthful, exculpatory information regarding a matter which was before them. Judge Scott issued a contempt citation for Petitioner which was dismissed by Judge Russell, who was appointed to hear the case, on the grounds that the actions of Petitioner were

protected by the constitutional right to freedom of speech. Nonetheless, Judge Scott complained to the Board which proceeded to take action against Petitioner, resulting in a censure.

The incident charged in paragraph 11 of the Petition is a truly trivial matter in which the District Attorney was summarily held in contempt by Judge Scott because he respectfully requested a written order from the Court (for purposes of appeal) before answering questions which might involve grand jury secrecy.

Only the incident alleged in paragraphs 3 and 12 relate to matters which were not totally "stale" at the time the Petition for Discipline was filed: Judge Scott without any prior consultation with the District Attorney enacted two local rules. One rule required the

District Attorney to type all the Judge's orders. The other rule, in garbled language, required the District Attorney to prepare "capias reports" for the court. No sample capias report was provided and so far as the District Attorney could determine no such thing as a "capias report" existed in the law books, form books, or any other jurisdiction in this or any other State. The record shows that the District Attorney filed a "capias report". In fact, he filed several. Each time a report was filed the Judge would reject it as wrong and the District Attorney would try again by filing another. At no time did the District Attorney ever have the actual capias document on which he was to report <u>in his possession.</u> (Pursuant to Tennessee statutory law, these documents were always either in the custody of the clerk of the court or the Sheriff.) Nonetheless, the

District Attorney sought information from the clerk and filed the "capias report'. But Judge Scott was not satisfied. He issued a contempt citation for an inadequate capias report. And then he issued another contempt citation because the District Attorney filed a pleading responding to the first contempt citation. The District Attorney paid a fine and spent ten days in jail. But this did not satisfy Judge Scott who again filed a complaint with the Board.

All the statements attributed to the District Attorney in the press which are the subject of the Petition for Discipline were the result of the constant harassment of the District Attorney's office by Judge Scott and the inevitable public interest in the ongoing courthouse feud.

Sometime after Judge Scott started filing petty complaints with the Board, Petitioner and his staff filed complaints with the Court of the Judiciary regarding Judge Scott's harassment. But unlike the Board which gave deference to Judge Scott's complaints and actively involved itself against James Ramsey, the Court of the Judiciary appeared to regard the matter as local politics and refused to be involved. In May, 1983 the Court of the Judiciary refused even to file Jim Ramsey's complaint against Judge Scott because of the pettiness of the bickering between the Judge and the District Attorney (letter of Chancellor Inman, Presiding Judge). As late as October 1986 the Court of the Judiciary stated it would not become involved in the "mutual animosity between the Circuit Judge and the District Attorney General's office" and that "both sides must learn to live

with it" (letter of Ben H. Cantrell, Presiding Judge).

ISSUES:

1. Does the Board have jurisdiction to discipline respondent by suspension or disbarment for actions taken in his official capacity as an elected District Attorney?

2. May the Board seek to litigate incidents raised in paragraphs 4 and 6 of the Petition when these matters were previously resolved and dismissed by the Board in June, 1980 in respondent's favor?

3. Are the out-of-court statements "alleged" in paragraphs 5, 7, 8, 9, and 10 of the petition protected by the right to freedom of speech under the U.S. Constitution?

4. Are DR 1-102 (A) (5) (6) and DR 7-106 (C) so vague as to violate due process of law as required by the 14th amendment to the U.S. Constitution?

5. Has the Board proven that respondent has violated any applicable provision of the Code of Professional Responsibility?

6. Has the Board, an arm of the judiciary, interjected itself into a purely local dispute between a member of the judiciary, Judge Buddy Scott, and a member of the executive branch, District Attorney James N. Ramsey, in derogation of the separation of powers of the Tennessee Constitution?

7. Should the Board have disclosed its financial or pecuniary interests which

they had on civil matters pending before Judge Scott in view of his pleading to them to listen only to his side of these disputes?

ARGUMENT:

The issue as to whether or not the Board has jurisdiction over actions of a duly elected District Attorney in the performance of his duties in one of first impression in Tennessee. In providing for impeachment as the sole method of removal for an incumbent District Attorney, the framers of the Tennessee Constitution have recognized that an elected prosecutor must have the greatest freedom in pursuing his duties and must be insulated from political pressures and fear of reprisal. Therefore, they entrusted control of the office for an 8 year period to the electorate (through the ballot) and to the

elected representatives of the people (through impeachment by the legislature).

The same concerns for the independence of the office are the basis for the doctrine of prosecutorial immunity. The result of entrusting these matters to a non-elected bureaucracy will be chaotic and unpredictable. For example, in the present situation the Board has decided to act on the side of the Judge in his local dispute with the District Attorney; but the Court of the Judiciary (perhaps more wisely) has decided to stay out of what is essentially a local political matter. This can hardly be perceived as a fair fight, where only one side can appeal to an outside authority for assistance.

It is by now clearly established that attorneys have first amendment rights to freedom of speech and that administrative

rules must recognize this. In Re Snyder 105 SCt 2874 (1985) and Garrison vs. Louisiana 85 SCt 209 (9164). Respondent also has first amendment rights as a public official and as a person who was being charged with criminal acts (contempt) U.S. vs. Harold Ford #87-5686/5695 6th Circuit, September 25, 1987.

The Board in paragraphs 5, 7, 8, 9 and 10 states that a public official who is being attacked cannot speak out in his own defense or in defense of his staff and about matters of public concern simply because he is a lawyer and because his statements may be interpreted as critical of the judiciary or of the Board. This is not supported in law. The position of the Board in paragraph 10 that a lawyer should be punished for statements critical of the Board illustrates the dangers to freedom

posed by a pretentious, all-powerful bureaucracy.

The District Attorney is a member of the executive branch of government. Pace vs. State 566 SW2d 861 (1978).

The complainant in all these matters is Judge James B. Scott, a member of the judiciary and the petition is brought by the Board which is an administrative arm of the judiciary. The basis of the dispute between District Attorney James Ramsey and Judge James B. Scott has been and continues to be the judge's desire to control the District Attorney's office--from choosing its personnel (Ken Caldwell and others) to influencing prosecutorial decisions (ex parte communications, questions about plea agreements and investigative matters before the grand

jury), to dictating clerical chores (the capias report and typing all orders).

In electing Jim Ramsey and Buddy Scott in 1982 after their dispute was public knowledge, the people of Anderson County indicated very clearly that they want checks and balances in the system and a separation of the executive and judicial powers, not a cozy relationship between the Judge and District Attorney. The actions of the Board endanger the independence of the District Attorney's office (and by implication, of the Judiciary) and attempt to give Judge Scott what he could not otherwise achieve through the ballot box or the impeachment process--that is, control of the District Attorney's office.

Respectfully submitted, this the 14th day of December, 1987.

/s/

James N. Ramsey, Petitioner
P.O. Box 3031
Oak Ridge, Tennessee 37830
(615) 457-5640

James E. Foglesong
Attorney for Petitioner
P.O. Box 56
Knoxville, Tennessee 37902
(615) 525-4158

**Exhibit M**

No. 49

IN THE

# SUPREME COURT OF TENNESSEE

AT KNOXVILLE

JAMES NELSON RAMSEY,

*Petitioner - Appellant*

VS.

BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE,

*Respondent - Appellee*

**ON DIRECT APPEAL FROM THE CIRCUIT COURT, CHANCERY DIVISION, SEVENTH JUDICIAL DISTRICT, ANDERSON COUNTY, TENNESSEE**

## BRIEF OF PETITIONER - APPELLANT JAMES NELSON RAMSEY

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Knoxville, Tennessee 37902
615/525-4158

ATTORNEY FOR PETITIONER - APPELLANT JAMES NELSON RAMSEY

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ORAL ARGUMENT REQUESTED

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## I. STATEMENT OF THE CASE

### A. Procedural History

This case commenced when a complaint against appellant was filed by Judge James Scott on April 18, 1985 with the Board of Professional Responsibility of this Court. (BF-1, 8-29-85, "Petition for Discipline", Ex. A. pp. 1-4.)[1] Appellant was served with the complaint and asked to reply. He pointed out that the complaint was too vague to be adequately answered. (*Id.*, p. 3 and p. 4.) The Board thereupon filed a more detailed complaint.

On August 29, 1985, Counsel for the Board of Professional Responsibility for the Supreme Court of Tennessee filed a lengthy Petition for Discipline (BF-1, 8-29-85, "Petition for Discipline") against appellant (Docket No. 85-252-2), which is the subject of this case.[2]

On November 22, 1985, the three-member Hearing Panel ("Panel") of the Board of Professional Responsibility ("Disciplinary Board" or "Board") held a pretrial conference on appellant's case. (BF-18, 11-22-85, "Transcript of Proceedings") That hearing was recessed so that appellant could take an interlocutory appeal on the question of jurisdiction of the Disciplinary Board over a District Attorney General to the Anderson County Chancery Court. (BF-20, 12-30-86, "Order and Permission for In-

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[1] Explanations of Citations and References to the Official Record of this case are described in Appendix A, *infra*.

[2] From the outset, appellant questioned the jurisdiction of the Board to proceed against him, because he was an elected Constitutional official. He filed a complaint for declaratory judgment in the Chancery Court for Davidson County, Tennessee (Davidson County No. 85-2024-II, dismissed by order of Chancellor C. Allen High on October 29, 1985.) He also sought to take an interlocutory appeal and a direct appeal to the Tennessee Supreme Court. B.O.P.R. No. 85-252-2, filed with Clerk John Parker on January 27, 1986 and dismissed *per curiam*, by order filed March 19, 1986. The appeals were dismissed without prejudice as being premature because a full administrative record was necessary in order for appellate rights to be mature.

terlocutory Appeal"; SC-48, p. 13.) The appeal was dismissed without prejudice. (SC-48, p. 255.)[3]

The hearing was resumed on March 16, 1987. (BF-25, 3-16-87, Two-Volume "Transcript of Hearing".) After concluding the hearing on March 17, 1987, the Panel, through an order filed April 8, 1987, (BF-28, 4-8-87, "Findings and Judgment"), found appellant demonstrated a "pattern" (*Id.* p. 5) of disrespectful behavior toward Judge Scott and directed that he be suspended from the practice of law for 180 days. (*Id.* p. 6.)

Following the Panel decision, appellant filed a motion on April 16, 1987 (BF-29, 4-21-87, "Motion to Vacate Panel Decision and Motion to Disclose Totality of Conflict of Interest") to vacate the decision on the grounds that at least two members of the Panel failed to disclose a potential conflict of interest arising from the fact that they had cases pending before Judge Scott at the time they sat in judgment on appellant. On May 29, 1987, a hearing was held (BF-32, 5-29-87, "Transcript of Motion to Vacate") on the motion to vacate; in an Order issued June 11, 1987 appellant's motion to vacate was denied. (BF-33, 6-11-87, "Order Denying Respondent's Motion to Vacate.")

On December 15, 1987, a *de novo* review of the Panel's determination was held in Chancery Court in Anderson County (SC-49). The matter was presided over by the Honorable William

[3] After the Hearing Panel denied appellant's motion to dismiss on December 26, 1985, he sought an interlocutory appeal to the Chancery Court for Anderson County to resolve the jurisdictional question. (SC-48.) On July 10, 1986, that Court filed a "Memorandum Opinion" in which the question of jurisdiction was addressed by Chancellor McDonald who sat by designation of the Supreme Court. Chancellor McDonald held that the words of Rule 9 apply to Appellant (SC-48, p. 258 at paragraph 3), but he declined to consider whether Rule 9 is therefore unconstitutional as applied to constitutional officers such as judges and district attorneys in view of the principle of Separation of Powers and the exclusive impeachment provisions of the Tennessee constitution. The Honorable Chancellor deferred to the exclusive right of the Tennessee Supreme Court to interpret its own rules (SC-48, p. 258 at lines 4 & 5). By order filed July 10, 1986, he dismissed the interlocutory appeal and remanded it (SC-48, p. 255). Appeal to the Supreme Court was made on July 31, 1986. SC-48 was dismissed *per curiam* without prejudice.

Inman, who had been designated (SC-49, p. 20) by the Tennessee Supreme Court to hear the matter. In a "Memorandum Opinion" issued December 18, 1987 (SC-49, p. 200), and in a subsequent memorandum issued January 11 (SC-49, p. 202), and a judgment filed January 13, 1988 (SC-49, p. 199), Chancellor Inman affirmed the findings of the Panel and the suspension of appellant for 180 days.

This appeal followed.

**B. Historical Setting**

Appellant, a native of Oak Ridge, Tennessee, was admitted to the Tennessee Bar in 1972. (BF-25, 3-16-87, Vol. I, "Transcript of Hearing," p. 174.) All of his professional life has been spent in Anderson County. After a period of private practice, appellant was elected as County Attorney for Anderson County in 1974. Appellant served as County Attorney until 1978. In 1977, Allen V. Kidwell, the brother-in-law of Judge Scott (SC-49, 12-15-87, III, "trans.," p. 11), was appointed Chancellor for Anderson County by then-Governor Ray Blanton; in 1978 James B. Scott, who was then District Attorney General for Anderson County, was appointed Circuit Judge in Anderson County by Governor Ray Blanton. The only two Circuit Court judges in Anderson County are James B. Scott and his brother-in-law Allen V. Kidwell. Scott was succeeded as District Attorney General by Mike Lawson, who was also appointed by Governor Blanton. (BF-25, 3-16-87, "Vol. I trans.," p. 175.)

In 1978 appellant ran for and won a hotly contested race for District Attorney General. (BF-25, 3-16-87, "Vol. I Transcript of Proceedings," p. 175.) Appellant defeated Mike Lawson, whom appellant contended was Judge Scott's hand-picked successor and who was also supported by the Anderson County Democratic Party establishment. Appellant's political opponents in that campaign included associates of Judge Scott (BF-25, I, pp. 188, 189) and (SC-49, III, p. 11) and (BF-25, II p.154).

After his election, appellant was faced with appearing before two judges who were allied in political hostility against him. (BF-

25, 3-16-87, "Vol. II Transcript of Proceedings," pp. 178-184, and p. 199) and (SC-49, III, p. 11.) Once in office, appellant hired a single assistant, Jan Hicks, to serve as Assistant Attorney General for the 7th Judicial District.

Shortly after being sworn in on September 1, 1978, appellant undertook to investigate corruption in Anderson County. (BF-25, II, pp. 184-186) and (SC-49, III, "Transcript of 12-15-87 Hearing," pp. 102-104) The focus of these investigations was public officials who worked in the Courthouse where Judges Scott and Kidwell had their chambers. (SC-49, III "Trans.", p. 13.) These investigations included those into: (1) embezzlement of insurance premiums by former school system employees; (2) audits of school programs for day care and food services; (3) misuse of CETA funds (in concert with an FBI investigation); (4) shortages in and embezzlement from the County Clerk's Office (SC-49, pp. 109-113); (5) legal and ethical violations by Judges Scott and Kidwell (BF-25, 3-16-87, Vol. I "Trans." pp. 177, 180-88, and 194) and (BF-25, Vol. II, pp. 29, 40-41, 123 and Ex. 40 thereto) and (BF-25, Vol. II, p. 155); and (6) the activities of then-Sheriff Dennis Trotter and the Sheriff's Department, concerning numerous activities including theft of evidence, kickbacks, and bribery. (SC-49, III, "Trans.", p. 64).

In September 1983, the FBI commenced investigation into the Sheriff's Department of Anderson County; the Bureau requested the District Attorney General's Office for Anderson County to cooperate with the investigation. In May 1984, this cooperation resulted in the arrest by the FBI of Sheriff Dennis Trotter and several other associates; they were charged in Federal Court and all of them pleaded guilty to felony offenses. (BF-25, Vol. I, p. 193.)

Most of the people investigated were associates and political allies of Judge Scott and Judge Kidwell. (BF-25, 3-16-87, "Vol. I, Trans. of Proceedings," pp. 186-191.) Reaction by Judge Scott was swift and intense. (*Id.*, Vol. I, pp. 191-192.)

Thus, on or about October 10, 1979, appellant's assistant, Jan Hicks, was told by Judge Scott, "I can put you in jail." (SC-49, III,

"Transcript", p. 33). On October 16, 1979, Judge Scott found appellant and Jan Hicks in contempt and jailed them for failure to obey an order of court. (BF-1, Ex. D, pp. 1 and 2.)

On March 28, 1980, Judge Scott summarily dismissed a special grand jury which had been convened to investigate Courthouse corruption. (SC-49, III, p. 12.) This grand jury was later reconvened, but on May 28, 1980, Judge Scott summarily dismissed the special grand jury, even though it had voted 13-0 to stay in session. (SC-49, III, p. 12.)

All of the allegations in the 1985 Petition for Discipline which resulted in the present case came about from complaints filed by Judge Scott in the past -- and no one else. Appellant has interacted with scores of attorneys and judges in the 16 years since he was admitted to the Bar, often as an advocate and an adversary, and has had dealings with many hundreds of citizens, all of whom were entitled to file disciplinary complaints to the Bar. (BF-25, Vol. II, p. 128.) Yet virtually all the complaints filed against appellant during that time were those of Judge Scott. (*Id.*)[4]

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[4] Additional factual material is presented in Appendix B, *infra*.

## ISSUES PRESENTED

In the opinion of appellant, the following issues are presented:

1. Whether application of Rule 9 of this Court's Rules to appellant violates the Tennessee Constitution and the Constitution of the United States ?

2. Whether appellant's rights to due process of law guaranteed by the Tennessee Constitution and the United States Constitution were violated:

a) where members of the Hearing Panel had interests adverse to appellant and did not *sua sponte* disqualify themselves ?;

b) where members of the Hearing Panel did not disclose these interests before the proceedings against appellant began ?;

c) where the Chancellor who reviewed appellant's case had previously expressed opinions about the merits of the case ?;

d) where the charges filed against appellant by the Disciplinary Board did not specifically and adequately allege violations of the Disciplinary Rules ?;

e) where appellant was not afforded the *de novo* hearing to which he was entitled ?;

f) where the determination made by the Hearing Panel and the Chancellor represented inadequate and inaccurate determinations of fact and erroneous conclusions of law; and

g) where the Hearing Panel and the Chancellor misused and erroneously took into consideration allegations of appellant's prior conduct ?;

3. Whether appellant was properly charged with any substantive offense ?;

4. Whether the evidence produced by the Disciplinary Counsel supported the charges against appellant and was sufficient to justify findings that he had violated the Disciplinary Rules ? and

5. Whether appellant's right to free speech guaranteed by the Tennessee Constitution and the United States Constitution was violated ?

## ARGUMENT

### I. JURISDICTION AND SEPARATION OF POWERS

Appellant respectfully contends that, as an elected public official, Rule 9 of this Court's Rules cannot be applied to him. To do so, it is submitted, would violate both the Tennessee Constitution and the United States Constitution. Thus, in suspending appellant the Disciplinary Board exceeded its statutory jurisdiction and violated the constitutional principle of separation of powers.

The Tennessee Constitution provides that popularly elected local District Attorneys General can be removed from office during their term only by the impeachment by the Legislature, that is, by other elected representatives of the people. The obvious constitutional purpose is to ensure and maintain a strong and independent corps of prosecutors, who will be responsive to the local citizenry and who will remain undisturbed in the exercise of their responsibilities so long as they retain the confidence of the people and their elected representatives.

Under the Tennessee Constitution judges and district attorneys are treated identically -- and protected equally -- with respect to removal from office. Article VI, Section 6 thereby ordains a single and exclusive method of removal for a District Attorney General -- impeachment. Consequently, the Disciplinary Board had no jurisdiction to suspend appellant.[5]

There appears to be no reported case in Tennessee where a district attorney or state judge has been permanently removed from office, or even temporarily suspended, by any procedure other than impeachment and by any body other than the Legislature.[6]

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[5] *Cf. Sams v. State*, 210 Tenn. 16, 356 S.W.2d 273 (1962); *State ex. rel Halsey v. Gaines*, 70 Tenn. 316 (1879); *In re Investigation of Circuit Judge of Eleventh Judicial Circuit*, 93 So. 2d 601 (Fla. 1957) (state judge cannot be disbarred until impeached). *See also In re Alonzo*, 284 Ala. 183, 223 So. 2d 585, *cert. denied sub nom., Alonzo v. Board of Commissioners*, 396 U.S. 996 (1969).

[6] A state judge has been disbarred for acts committed while a judge, but in this case disbarment occurred only *after* the judge had been successfully impeached

An Alabama case is perhaps the closest one factually to appellant's. In that case, the district attorney, who, like appellant here, was a constitutionally elected officer subject to impeachment, was required to be licensed to practice law and was prohibited from practicing law except in the discharge of his duties as a prosecutor. The Alabama Supreme Court held that the Board of Commissioners of the Alabama State Bar had no jurisdiction to discipline or disbar the district attorney. *Simpson v. Alabama State Bar*, 311 So.2d 307 (Ala. 1975).[7]

This Court has expressed similar doubts about the constitutionality of applying general disciplinary procedures to judges and district attorneys and, accordingly, has suggested that any provisions of law which purport to authorize the removal of a elected public official who is otherwise subject to the constitutionally-created discipline of impeachment should expressly refer to those officers in specific terms and not merely in general ones. *In re Dender*, 571 S.W.2d 471 (Tenn. 1978).

### 1. Statutes and Rules

The Code of Professional Responsibility (Rule 8 of the Tennessee Supreme Court Rules; the "Code") at no point purports to regulate the conduct of "judges" or "district attorneys." The Code is defined as the "ethical standards relating to the practice of law" and does not mention "judges" or "district attorneys." By Ten-

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and removed from office. Therefore, his disbarment did not interfere with his duties of office or unconstitutionally assume the prerogatives of the Legislature. *Schoolfield v. Tennessee Bar Ass'n.*, 209 Tenn. 304, 353 S.W.2d 401 (Tenn. 1961). Authorities in other states are conflicting as to whether a judge subject to impeachment can be disciplined by suspension of his license to practice law during his term in office. *See* Annotation, "*Misconduct in Capacity as Judge as Basis for Disciplinary Action Against Attorney*," 57 A.L.R.3d 1150 (1974). The few cases that deal with district attorneys report that they are generally treated as judges are treated. *Id.*

[7] Courts in other states have held that whatever other sanctions may be available through disciplinary proceedings, a district attorney cannot be deprived of his right to appear in court and represent the state while in office. *Snyder's Case*, 301 Pa. 276, 152 A. 33 (1930); *In re Maesretti*, 93 P. 1004 (Nev. 1908).

nessee statute, a District Attorney General is prohibited from the "practice of law." T.C.A. § 8-7-104. That statute thus conforms to and recognizes the simple fact that, in reality, judges and district attorneys do not engage in the "practice of law", as that phrase is generally understood. Instead, that phrase commonly refers to the performance of professional legal services for fees for individual and corporate clients. District attorneys and judges are not hired by clients and their duties and obligations are set by statute, not by contract. Judges and district attorneys are engaged in the practice of government; they are elected public officials who are assigned specific roles in the adjudicatory process of the court system created constitutional and statutory mandate.

The Tennessee legislature has implicitly recognized the fact that the conduct of judges and district attorneys is not subject to or governed by the strictures of the Code of Professional Responsibility. This is demonstrated by the fact that when the legislature perceived a need to provide a mechanism for the discipline of judges or district attorneys (short of and in addition to the constitutionally prescribed provision of impeachment and removal) it deemed it necessary to enact specific legislation to accomplish this goal. Thus, the legislature devised a detailed procedure whereby the Supreme Court may reprimand or suspend a judge for a maximum of 30 days on full salary without recourse to impeachment. T.C.A. § 17-1-106, *et. seq.* Similarly, the legislature gave the Disciplinary Board only narrowly circumscribed jurisdiction over district attorneys, *i.e.*, limited to misconduct before a grand jury. T.C.A. § 8-7-502.

Clearly, if the legislature had thought that the Disciplinary Board already had jurisdiction over all behavior by a district attorney, it would not have determined that the enactment of T.C.A. § 8-7-502 was necessary.

**2. Constitutional and Policy Considerations**

Persons admitted to the Bar are authorized by this Court to practice law, with the understanding that are subject to the provisions of the Code and the authority of this Court's Disciplinary Board. Private practitioners are thereby put on notice that

if they violate the Code the Board may condition or revoke their professional licenses. As an elected public official who happens to be a member of the Bar, however, a District Attorney General occupies a unique status, one quite different than other members of the Bar.

An elected public official, who is also a lawyer, has received a grant of authority additional to that dispensed by this Court: the direct mandate of the people, a mandate to perform the official duties of the office to which he has been elected. For this reason, any action by the Disciplinary Board against an elected public official that would effectively remove or disqualify him from office would not affect him alone; it would unconstitutionally impinge upon and interfere with the sovereignty of the people from whom his authority is derived.

As a public official, a District Attorney General is a trustee and servant of the people, for whose benefit and on whose authority representative government is constituted.[8] Lawyers who are elected officials have duties and obligations which differ fundamentally from those incumbent upon lawyers engaged in private practice. For example, the public lawyer has an overarching duty to seek justice and not merely victory, whereas private counsel must "zealously" pursue a private claim or position within the bounds of the law. *Compare*, Supreme Court Rule 8, Disciplinary Rule ("DR") 7-101, *with*, DR 7-103, *and* Ethical Consideration ("EC") 7-1, *with*, EC 7-13.

Logically, if the Board is not constitutionally or statutorily empowered to suspend or disbar elected district attorneys directly, then it cannot indirectly restrict the powers or salary attendant to that office. Since district attorneys in this state are prohibited by statute from practicing law, T.C.A. § 8-7-104, suspension or disbarment are meaningless except as a statement of the Board's disapproval of the district attorney. Such an activity would indirectly interfere with the electoral process. No panel of appointees in

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[8] Tennessee Constitution, Article I, Section 1. *See, e.g., Williams v. Carr*, 218 Tenn. 564, 404 S.W.2d 522 (1966); *Luehrman v. Taxing District of Shelby County*, 70 Tenn. 425 (1879); *Davis v. State*, 71 Tenn. 376 (1879).

Tennessee, whether executive, legislative, or judicial, has authority to evaluate elected officials or interfere with their term of service. The Disciplinary Board is an arm of the Tennessee Supreme Court and is prohibited from participating in partisan political activity. *See* Supreme Court Rule 10, Code of Judicial Conduct, Canon 7. Consequently, appellee should not be involved in activities which interfere with the functioning of an elected constitutional official.

Moreover, the Disciplinary Board's exercise of authority over appellant violates the fundamental principle of separation of powers, which is established in and guaranteed by the Tennessee Constitution. Article II, Sections 1 and 2. The Tennessee Constitution divides the powers of government into three distinct, independent, and coordinate branches, each of which is forbidden from encroaching upon the powers and prerogatives of the others. *Richardson v. Young*, 122 Tenn. 471, 125 S.W. 664 (1909); *Moore v. Love*, 171 Tenn. 682, 107 S.W.2d 982 (Tenn. 1937). Each branch of government is restrained from interfering with the operations and personnel of the others, except in constitutionally permissible ways. *Anderson County Quarterly Court v. Judges of the 28th Judicial Circuit*, 579 S.W.2d 875 (Tenn. App. 1978). This principle is regarded as absolutely critical in preserving a republican form of government and ensuring the liberty of the people. *State v. Staten*, 46 Tenn. 233 (1869); *Lynn v. Polk*, 76 Tenn. 121 (1881); *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593-94 (1952) (Frankfurter, J., concurring).

In practice, this principle means that, on the one hand, the legislature cannot exercise authority reserved to the judiciary, *Jones' Heirs v. Perry*, 18 Tenn. 59 (1836); *State v. Fleming*, 26 Tenn. 152, (1846); *Ex parte McCardle*, 74 U.S. 506 (1869), while , on the other hand, the judiciary cannot exercise powers entrusted solely to the legislature. *Ford Motor Co. v. Pace*, 206 Tenn. 559, 335 S.W.2d 360 (Tenn.) *appeal dismissed*, 364 U.S. 444 (1960).[9]

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[9] *See generally, State ex rel. Latture v. Board of Inspectors*, 114 Tenn. 516, 86 S.W. 319 (Tenn. 1904); *Jonesboro, Fall Branch & Blair's Gap Turnpike Co. v. Brown*, 69 Tenn. 490 (1875); *Immigration and Naturalization Service v. Chadha*,

Clearly, a district attorney performs an executive function. *Pace v. State*, 566 S.W.2d 861 (Tenn. 1978).[10] The fundamental duty of a district attorney is the exercise of the charging function, which clearly involves executive power and which is particularly unsuited to judicial oversight.[11] Yet, the net result of the Disciplinary Board's actions in this case is for the judiciary to have become involved in prosecutorial decisionmaking. This would not only affect the independence of district attorneys but would also threaten the impartiality, independence, and integrity of the judiciary and, inevitably, undermine the principle of separation of powers. *See Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984).

The power to suspend is the power to control. Consequently it is inappropriate for a judicial administrative body such as the Disciplinary Board to exercise control over a district attorney in the form of suspension, particularly under broad general rules of discipline, rules which were never intended to cover the functions of a district attorney.

If the Disciplinary Board had the power to control the District Attorney General's Office in this fashion there would be nothing to prevent the Board from acting on complaints of a criminal defendant that a district attorney's charging decision had been "prejudicial to the administration of justice", DR 1-101 (A) (5), or "adversely reflects upon [the district attorney's] fitness to practice law." DR 1-101 (A) (6). Obviously, district attorneys should not be distracted from their duties by the obligation of answering and litigating such complaints, whatever their merit or ultimate outcome. The longstanding policies behind prosecutorial immunity and prosecutorial independence come into full play here, and provide further reason why the Disciplinary

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462 U.S. 919 (1983); *Dames & Moore v. Regan*, 457 U.S. 654 (1981); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*.

[10] Although a district attorney is listed under the "Judicial Department" in the Tennessee Constitution (Article VI, Section 5), the office is not vested with judicial power (Article VI, Section 1).

[11] *See* Note 9, *supra*.

Board cannot be permitted to exercise authority over district attorneys.

This does not mean that district attorneys are immune from sanction for misconduct. Permissible sanctions indeed exist under Tennessee law and include: impeachment; contempt procedures; criminal process; discipline which does not constitute removal or interfere with prosecutorial functions; and, civil liability for activities not protected by prosecutorial immunity.[12] Any benefit that might accrue from having the Board of Professional Responsibility have oversight over a prosecutor for any other reasons not covered by the above remedies is far outweighed by the danger that the Disciplinary Board would be used by local factions or personalities for purely selfish or partisan political purposes.

An elected official is ultimately responsible to the people who elected him. Although this is guaranteed by the Tennessee Constitution, *cf. Williams v. Carr*, 218 Tenn. 564, 404 S.W.2d 522 (Tenn. 1966), this was effectively denied to appellant in this case.

Furthermore, some of the Disciplinary Rules which appellant was charged with violating are so broad and vague that their application necessarily involves very subjective judgments.[13] A prosecutor should be able to act in accordance with the best interests of his constituents and his own conscience without fear that his ability to function will be restricted -- or even terminated -- by persons who do not function as prosecutors, do not live in his jurisdiction, do not understand his problems, and may have undisclosed and impermissible political motives. A publicly elected prosecutor, such as appellant, should not be placed in a situation where attempts by individuals whom he is investigating, for ex-

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[12] The law also provides procedures for the appointment of a district attorney *pro tempore* where the elected district attorney is unable or unwilling to perform his duties.

[13] For example, the requirement of DR 1-102 (A) that "a lawyer shall not engage in conduct that is prejudicial to the administration of justice ... or engage in any other conduct that adversely reflects his fitness to practice law," while meaningful within the context of the lawyer's function, may well be extraneous to evaluation of the public performance of a district attorney.

ample Judge Scott and his political allies (SC-49, III, "Trans.", p. 64), to file disciplinary actions against him might cause him to forsake his obligations to the electorate because of his fear that he may be removed from his post by the Disciplinary Board. (BF-25, II, pp. 73, 182).

In providing for popular election of a District Attorney General and in further providing for removal only by impeachment, the Framers of the Tennessee Constitution plainly intended that prosecutors would reflect the values and concerns of their fellow citizens. This goal means, among other things, that prosecutors would not be subject to the control of any body -- no matter how created and no matter with how altruistic its purpose -- whose members are neither chosen by the electorate nor accountable to them. The role of a District Attorney General is inherently controversial and, being sworn to uphold the law without fear or favor, he must be insulated from recrimination and harassment in order to perform the duties of his office with integrity.[14]

Although these principles might seem abstract, in appellant's case they describe the reality: appellant, undertaking to investigate Anderson County corruption and, withal, the associates of Judge Scott, has been visited with retaliatory disciplinary complaints made by Judge Scott and his colleagues. (SC-49, III, "trans.", p. 104; BF-25, I, p. 186; BF-25, II, p. 74). The provisions of the Tennessee Constitution that establish he principle of separation of powers were designed to forestall exactly such tactics and to protect his independence.

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[14] In this respect, this Court is confronted with an issue broader than the dispute between appellant and the Disciplinary Board: the rights of the voters and citizens of Anderson County. The Tennessee Constitution and the United States Constitution makes them the ultimate sovereign. Tennessee Constitution, Article 1, Section 1. Under a Constitutional structure such as ours which permits removal of an elected official only by impeachment, the action of the Disciplinary Board in suspending appellant violates the right of the citizens of Anderson County to the faithful services of the person they elected.

## II. DENIAL OF DUE PROCESS

The manner in which proceedings were conducted against appellant before the Hearing Panel and the Chancellor violated the guarantees of procedural due process afforded by Article I, Section 8 of the Tennessee Constitution and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[15]

In the ensuing discussion we will demonstrate that appellant's due process rights were violated in five discrete ways, namely:

(1) that the decisionmakers below were tainted with the appearance of interest and bias;

(2) that appellant did not receive adequate notice of the charges against him;

(3) that he was denied his right to a true *de novo* hearing before the Chancellor;

(4) that neither the Panel nor the Chancellor made a judicial determination of appellant's case; and

(5) the prior allegations against appellant were improperly used by the Panel and the Chancellor.

Each one of these circumstances represents a patent violation of "fundamental fairness", fairness that is the heart of due process and "ordered liberty." *Benton v. Maryland*, 395 U.S. 784 (1969); *see Palko v. Connecticut*, 302 U.S. 319 (1937). Each one of these violations of due process establish that appellant's suspension must be vacated; taken together, these violations compel that result.

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[15] Appellant had a property right in his office, thus entitling him to procedural due process. *See State v. Kerby*, 136 Tenn. 386, 189 S.W. 859 (Tenn. 1916). *See generally, Connick v. Myers*, 461 U.S. 138 (1983); *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

**1. Decisionmakers: Appearance of Interest and Bias**

A hallmark of our system is bias-free decisionmaking. Due process requires that every judicial or quasi-judicial proceeding, whether civil, criminal, or administrative, shall be conducted by neutral, detached, and impartial triers of fact.

The United States Supreme Court has held that "[a] fair trial in a fair tribunal is a basic requirement of Due Process." *In re Murchison*, 349 U.S. 133, 136 (1955). *See also Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986). This requirement applies to agencies and governmental hearing officers as well as judges. *Withrow v. Larkin*, 421 U.S. 35, 46 (1975); *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973); *American Cyanamid Co. v. Federal Trade Commission*, 363 F.2d 757, 767 (6th Cir. 1966), *later app. on other grds, sub nom. Chas. Pfizer & Co. v. F.T.C.*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969).[16]

Decisionmakers are constitutionally unacceptable under the Due Process Clause where they have bias for or against a particular party or an interest in the outcome of the adjudication. The Supreme Court has stated that even the *appearance* of a pecuniary interest in legal proceedings should prompt an adjudicator to disqualify himself. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973), (citing *Tumey v. Ohio*, 273 U.S. 510 (1927)). Further, the Court has emphasized that the apparent financial stake need not be direct or positive. *Gibson v. Berryhill, supra*, (citing *Ward v. Village of Monroeville*, 409 U.S. 57 (1972)).[17]

The dispute which underlies this case essentially involved Judge Scott, on the one hand, and appellant, on the other. (BF-25, I, p. 18). Judge Scott was not merely an occasional antagonist

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[16] *See Freidman v. Rogers*, 440 U.S. 1, 17-20 (1979); *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971); K. Davis, *Administrative Law*, § 19.1 *et seq.* (2d. ed. 1980).

[17] Similar sentiments were expressed by this Court in *In re Dender*, 571 S.W. 2d 491 (Tenn. 1978), *supra*, holding unconstitutional the issuance of a warrant by a non-salaried justice of the peace whose personal compensation is enhanced by the issuance of the warrant.

of appellant, he was his unceasing nemesis, who had cited appellant for contempt on numerous occasions and who had filed complaints with the Disciplinary Board against appellant nearly as often. *See* Appendix B, *infra*.

Under these circumstances, appellant was entitled to procedural due process that would insure: (1) that the Hearing Panel was free of bias and even the appearance of interest; (2) that Chancellor Inman was free of both actual and apparent interest; (3) that both the Panel and the Chancellor would disclose information tending to show an appearance or actual interest or bias; and (4) if appropriate, Panel members and the Chancellor would disqualify themselves *sua sponte*.

Denial of any one of these entitlements would violate due process. As we shall demonstrate, appellant was denied all four of them.

**a. The Hearing Panel**

The Hearing Panel consisted of three attorneys. These attorneys heard the evidence against appellant at a proceeding in March, 1987. Judge Scott was as much the focus of the hearing as appellant. First, he initiated *all* of the charges against appellant which were being heard. (SC-48, pp. 31-73) Second, far from simply lodging a complaint, he was the *only* live witness who testified at the proceeding. (BF-25, II, p. 132). Third, as a witness, Judge Scott did more than testify about facts; instead he was a protagonist who made a personal appeal to the Board against appellant during his so-called testimony. (BF-25, II, p. 146).

The vehemence of Judge Scott's views were particularly important because, unbeknownst to appellant, at least two of the three attorneys on the Panel (or their firms) had civil suits pending before Judge Scott at the same time they were receiving testimony, weighing evidence, and sitting in judgment on appellant. (BF-29; 5/29/87 Transcript, "Motion to Vacate Hearing", pp. 11-12). The third member of the Panel filed a large civil suit before Judge Scott within five weeks after the hearing. (*Id.*, p. 9). Appel-

lant placed the total value of the claims in these suits at least $2,347,750. (*Id.*, p. 12).

Significantly, none of the Panel members revealed this clear appearance of interest, and none voluntarily disqualified themselves, either before or after these facts were brought to light. A decisionmaker sitting in a judicial position in a proceeding where he has a case pending before the complainant (a judge) unquestionably presents the appearance of interest. But no Panel member brought these matters to the attention of the parties or their counsel.[18]

Several weeks after the March, 1987 hearing, appellant first heard rumors that two of the Panel members had cases pending before Judge Scott's court (*See* BF-32, May 29, 1987, Tr. 7, 19). Appellant then carefully checked public court records and confirmed the allegations. Shortly afterwards, appellant filed a motion to vacate the Panel's findings based upon this newly-discovered and incontrovertible information. (BF-29, 4/21/87) His motion made two reasonable requests: that the Panel members (1) provide a list of all the cases which they (or their firms) had pending before Judge Scott; and (2) vacate their order of suspension because of an appearance of interest.

At a hearing held on the motion to vacate, appellant clearly and incisively put the basic issue to the Panel members:

> "With all due respect, the reason why I have filed this motion and urged my attorney to argue it -- somewhat against his will, I might add -- is that *it's just wrong. The three of you distinguished gentlemen to be writing sanctimonious opinions about my ethics while sitting here on $2.3 million worth of pecuniary interest [before Judge Scott] and the court [Judge Scott] the only complainant*

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[18] Besides being important to appellant, the appearance of bias and interest of Panel members was, or should have been, important to the Disciplinary Counsel, whose obligation was to conduct a fair and equitable investigation. *See, State ex rel. Turner v. Denman*, 36 Tenn. App. 613, 259 S.W.2d 891, 897 (Tenn. Ct. App. 1952) (disciplinary investigations "should be made impartially and with a view of ascertaining the truth .... .")

> *against me. And it's just not right. It should be set aside."* (BF; 5/29/87 Hearing on Motion to Vacate, Tr., at 21.) (emphasis added).

Appellant made quite clear to the Panel that the crucial point was *disclosure* of potential interest:

> "I have a Disciplinary Rule – *Rule 8* – that *says that such interest must be disclosed.* It doesn't say that once disclosed it would be a conflict of interest or even a disqualifying fact. *It requires disclosure. If that had happened in this case, then due process would have been satisfied. I would have had an option to waive that pecuniary interest or do what I did when I had another situation similar."* (*Id.*, at 21-22). (emphasis added).

Finally, he explained that the Panel's silence prevented him from asserting and vindicating his rights:

> *"I was foreclosed from exercising that option with respect to the Panel, because I did not know the facts. And they did not disclose them."* (*Id.*, at 19) (emphasis added).

None of the Panel members denied the allegation of having the pending cases in front of Judge Scott, nor did any of them dispute the monetary claims at stake in these cases. But this direct and serious indictment of the fairness of the Panel had no impact. And apparently no self-examination of a serious problem occurred. The Panel instead put the burden on appellant and asked him if *he* could cite authority providing grounds for pecuniary disqualification. *Id.*, p. 19.

In a formal order entered on June 11, 1987, the Panel rejected appellant's motion. It refused to provide a list of cases which its members (or members of their law firms) had before Judge Scott; the reason offered was that the number of such cases would make no difference whatsoever. The Panel also refused to vacate its previous order of suspension because it was not satisfied that any authority existed:

> "supporting the proposition that acting as legal counsel in civil cases in the Court presided over by the Judge

> who filed the disciplinary complaint constitutes a conflict of interest or pecuniary interest which could be affected by the Panel's decision." (BF, 6/11/87, "Order Denying Respondent's Motion to Vacate", at 2).

The Panel misapprehended the issues. The true questions were not only whether bias or interest *in fact* existed, but also (1) whether merely the *appearance* of bias or interest existed and, (2) whether timely *disclosure* should have been made. The Panel was obliged to disclose that at least two, and perhaps all three[19] Panel members had cases before Judge Scott. Timely disclosure would have afforded appellant seasonable opportunity to move to disqualify or seek other redress.

The Panel also misapprehended the law. Due process is violated if merely an *appearance* of interest or bias exists. A Sixth Circuit decision is instructive on this score. Discussing due process in the context of an administrative adjudication, the Sixth Circuit stated:

> "It is fundamental that both unfairness *and the appearance of unfairness* should be avoided. Wherever there may be reasonable suspicion of unfairness, it is best to disqualify." *American Cyanamid Co. v. F.T.C., supra*, 363 F.2d at 767 (emphasis added).

In another case, the Sixth Circuit pointed out that once "the objective appearance of impartiality" disappears, a factfinder *must* disqualify himself. *Roberts v. Bailar*, 625 F.2d 125, 129-130 (6th Cir. 1980). An appearance of bias is generally sufficient; proof of actual partiality need not be established. *Hall v. Small Business Administration*, 695 F.2d 175 (5th Cir. 1983).

These precepts apply in lawyer disciplinary proceedings. Whenever a hearing board member has an interest, financial or

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[19] By May 29, 1987, when the Panel heard appellant's motion to vacate, it appears that *all* the members had cases before Judge Scott. Also, the concluding sentence of the Panel's June 11 opinion implies that all three of the Panel members then had cases before Judge Scott. (BF-33, 6/11/87 "Order Denying Motion to Vacate"; *see also* BF-32, 5/29/87, Transcript, p. 9).

otherwise, in a proceeding, the member must recuse himself. *In re Heirich*, 140 N.E.2d 825 (Ill. 1956). In *Heirich*, an attorney sitting on a disbarment proceeding against another attorney specializing in railroad negligence cases was a member of a law firm representing railroads that financed and directed investigations leading to the disbarment proceeding. The Illinois Supreme Court concluded that an *appearance* of interest existed, and because of that appearance alone, the attorney should have disqualified himself from the disbarment board.

> "[W]e hold that when such an arbiter has a financial interest in the subject matter, even though he personally be a man of the most fastidious probity, it is his duty to recuse himself. He must do so if challenged." 140 N.E. 2d at 839.

Appellant's position before this Court parallels that of Heirich before the Illinois Supreme Court. Although he has no reason or intention to question the probity or honor of the members of the Panel in his case, he nevertheless respectfully submits that the standard of *Heirich* is applicable to this case and thus required disclosure and disqualification.[20]

Significantly, the *Heirich* court relied upon the decision of the Court of Appeals of Tennessee in *State ex rel. Turner v. Denman, supra*, which recognized the corrosive effect of pecuniary interest or bias in a lawyer disbarment proceeding. *Denman* held that in a disbarment proceeding the Chancellor properly rejected evidence offered which had been gathered by investigators whose employer had a pecuniary interest adverse to the attorneys who were under scrutiny in the proceedings. *See* 140 N.E.2d at 837-838, citing 259 S.W.2d at 896.[21]

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[20] *Heirich* also pointed out that disqualification for interest applies to administrative boards and commissions and other arbiters besides judges. 140 N.E.2d at 838.

[21] The principal of *Heirich* has been followed elsewhere. "[C]ommon law notions of disqualification are so pervasive that they should reach the present case without a meticulous search for statutory foundation, and cases in the field of

Provisions of the Tennessee Constitution and the Rules of this Court regarding judicial disqualification provide additional and persuasive support for appellant's position. Article VI, Section 11 of the Tennessee Constitution, in pertinent part, specifies that: "No judge of the Supreme or Inferior Courts shall preside on the trial of any cause in the event of which he *may be* interested ... ." (emphasis added). Rule 10, Canon 3, of this Court's Rules similarly states, *inter alia*, that a judge should disqualify himself in any proceeding (1) "in which his impartiality *might* reasonably be questioned," or (2) where "he knows that he, individually, or as a fiduciary ... has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that *could be* substantially affected by the outcome of the proceeding." (emphasis added).

These principles governing judicial conduct underscore appellant's view that Panel was tainted by at least the appearance of interest and the appearance of impropriety. Given the cases pending before Judge Scott and given the great importance Judge Scott placed on having appellant disciplined, one must wonder whether anything weighed on the minds of the Panel members other than the evidence before them, *i.e.*, whether their own fortunes and reputations, or at least those of their clients, also weighed, impermissibly weighed, in the balance. It certainly appears likely that that Panel members could have realized that if they ruled in favor of appellant, they might jeopardize their interests in the cases then pending before Judge Scott, whereas if they ruled against appellant and for Judge Scott, the favor might be returned or, at least, they might find that he would not be an-

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administrative law support such a general view." *Board of Selectmen v. Alcoholic Beverages*, 369 N.E.2d 1011, 1016 (Mass. 1977), citing *In Re Heirich*. *See also Chicago M. St. P. & Pac. R. v. Washington St. Com'n*, 557 P.2d 307 (Wash. 1977), (finding an "impermissible conflict of interest" where a member of a hearing tribunal had a job application pending with one of the party's before the tribunal), and *Boughan v. Board of Engineering Examiners*, 611 P.2d 670, 672 (Or. 1980), (disqualifying a member of a hearing panel who had been hired to replace the party being reviewed).

tagonistic to them regarding the cases and even might be favorable to them in these and other cases.[22]

Appellant was entitled to a *de novo* review of this issue (as well as all others) regarding the Panel's interest and nondisclosure when his case came before Chancellor Inman.[23] But, the Chancellor instead compounded the violation of appellant's due process rights. He did not conduct a *de novo* hearing and he did not independently scrutinize these most serious (and documented) claims. Instead, he rejected appellant's argument in a terse and unelucidating statement:

> "Evidence concerning this issue [interest] is not very satisfactory -- one of the [Hearing Panel] members may have had cases pending in [Judge Scott's Court] but *it is not believed that this is a disqualifying factor.*" (SC-49, p. 200) (emphasis added).

Chancellor Inman thus made no inquiry on his own into the interest, or appearance of interest, of the Panel Members. Nor did he explicate the basis for his "belie[f]" that interest was not a "disqualifying factor". In fact, he did not even recognize that the issues for his review also included whether there was an *ap-*

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[22] In a more general vein, the appearance of interest also ran to maintaining their reputations as effective litigators before Judge Scott and with present and future clients. This, too, is a recognized "interest" for, as *Heirich* indicated, the interest for the appearance of which would be disqualifying need not be pecuniary: "it need only be an interest which can be viewed as having a potentially debilitating effect on the impartiality of the decisionmaker." *International Harvester Company v. Bowling*, 391 N.E. 2d 165, 171 (Ill. 1979).

The Panel opinion concluded: "The Panel notes that there was not any partiality in fact present in its hearing in deciding the case" and added that it did not even believe that the appearance of partiality existed. (BF-33; 6/11/87 "Order Denying Respondent's Motion to Vacate", p. 2). This begs the question. Disclosure was required in the first instance and without it appellant was denied his right to seek recusal of the Panel before it undertook consideration the merits of his cases and indeed, before it passed upon the disqualification issue itself. *Cf.*, *Offutt v. United States*, 348 U.S. 11 (1954).

[23] Judge Inman's obligation to inquire into the allegations of interest and bias was even more imperative because he was obliged to conduct a *de novo* hearing.

*pearance of interest* and whether the Panel Members had an *obligation to disclose* information relating to the appearance of interest. The Chancellor also appeared completely uninterested in the fact that not one, but at least two and, indeed, possibly three, Panel members had cases before Judge Scott's Court. Chancellor Inman never undertook to explore these fundamental questions and, so, perpetuated the violation of appellant's due process rights.

**b. The Chancellor**

There are separate reasons why Chancellor Inman should have disqualified himself *sua sponte*. The Chancellor was familiar with the ongoing conflict between appellant and Judge Scott and he had previously formed and expressed opinions about the merits of their ongoing controversy. (SC-49, pp. 136-39; "Petition Pursuant to Rule 11", I, (5), (6) & Ex. 2 thereto). Under these circumstances he should have disqualified himself on his own motion.

Rule 10, Canon 3 (C) of this Court's Rules *requires* that a judge disqualify himself where "his impartiality *might reasonably be* questioned" or where he has "a personal bias or prejudice concerning a party ... ." (emphasis added). The Rule implies, and applicable case law supports, the view that when a judge finds such conditions exist he has an ethical obligation not only to view with favor a motion for recusal but to disqualify himself *sua sponte*.

On May 31, 1983, while serving as Presiding Judge of the Court of the Judiciary, Chancellor Inman wrote a letter to appellant in response to a complaint appellant had filed with that Court about Judge Scott. (SC-49, p. 137 & Rule 11 Petition, *supra*, Ex. 2). That letter revealed that Chancellor Inman had already fixed his opinions about the dispute between appellant and Judge Scott. This letter discloses the Chancellor's appearance of bias and perhaps actual bias as well.

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It has been authoritatively stated, that "where there is any suggestion of bias in an administrative tribunal, the court on judicial review would look more critically at the tribunal's findings." Jaffe & Nathanson, *Administrative Law: Cases and Materials*, at 997 (3d ed. 1968), citing *Wisconsin Telephone Co. v. Public Service Commission*, 232 Wis. 274, 287 N.W. 122 (Wis. 1940).

First, Chancellor Inman stated:

> "It is not an indiscretion for me to tell you that all of us [presumably, the members of the Court of the Judiciary] are utterly appalled about the continuing strife; this view is apparently shared by all concerned Tennesseans." (*Id.*)

Second, Chancellor Inman explained:

> "You must understand that in some instances, according to our information, you, or your office, have provoked Judge Scott into a reaction." (*Id.*)

As the Supreme Court has stated:

> "The guiding consideration is that the administration of justice should reasonably *appear to be* disinterested as well as to be so in fact."[24]

Appellant submits that it is beyond question that the quoted remarks of Chancellor Inman indicate that he had prejudged the issues and had abandoned at least the appearance of impartiality in appellant's case. The fact that he was "utterly appalled" about the controversy underlying the case suggests a strongly held opinion about it. The remark that he believed that appellant's action had "provoked" Judge Scott indicates who he deemed most responsible for the "continuing strife." The remarks also are condemnable as reflecting that Chancellor Inman had apparently received information about the case from outside sources (unknown to appellant and beyond the reach of cross examination), and that this information was detrimental to appellant. On the basis of appearance alone, Chancellor Inman should have disqualified himself from appellant's case.

Appellant wishes to be understood that his complaint against Chancellor Inman is in no way an attack upon his integrity or skill. The issue is one of appearances: in *Roberts v. Bailar, supra*, a distinguished federal judge in this state was found recusable *sua*

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[24] *Public Utilities Commission v. Pollack*, 343 U.S. 451, 466-467 (1952) (emphasis added).

*sponte* by the Sixth Circuit merely because he stated that the defendant in a sex discrimination case "is an honorable man and I know that he would never intentionally discriminate against anybody." 625 F.2d at 127. Because that statement, like those of Chancellor Inman, showed a reasonable factual basis for doubting the judge's impartiality, he was deemed to be under a duty to recuse himself. *Id. See also School District of Kansas City Missouri v. State of Missouri*, 438 F. Supp. 830 (W.D. Mo. 1977).

Finally, in his May 30, 1983 letter, Chancellor Inman wrote:

> "As we view of the matter, misconduct (as the word is commonly used) in the sense that it implies a degree of depravity, is not involved; rather what is involved is a constant, petty, puerile bickering between two professionals charged by law and by oath with Constitutional duties to allow personal and political considerations to transform sworn duties to the extent of disrupting justice in Anderson County." (SC-49, p.137; Rule 11 Petition, *supra*, Ex. 2).

Appellant's position throughout these proceedings has been that the behavior of Judge Scott was anything but "petty, puerile bickering." He maintains that Judge Scott's repeated filing of unwarranted disciplinary complaints against him was motivated by partisan politics and personal malice. However, the quoted passages reveal that Chancellor Inman apparently had prejudged the issues and had concluded that the dispute was trivial and that there was no misconduct (as he defined it) on Judge Scott's part. Obviously, by the time he was called upon to sit on appellant's case in 1985, Chancellor Inman had lost at least the appearance of, and perhaps even actual, impartiality.

These statements show that Chancellor Inman had formed focused opinions adverse to appellant *before* he sat on appellant's case.[25] It is respectfully submitted that due process therefore required his *sua sponte* recusal.

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[25] We are obliged to disclose to the Court that on December 11, 1987 appellant stated in a pleading his belief that "Judge Inman will be as fair as any other

**2. Lack of Adequate Notice**

The minimal requirements of due process are "notice and the opportunity to be heard." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).[26] It is clear that without adequate prior notice to an individual who may be affected by a governmental decision, all other fundamental procedural rights may be for naught. Due process thus requires that notice be given both of the charges and the facts which would support an adverse decision against the individual. *See Goss v. Lopez*, 419 U.S. 565 (1975); *Memphis Light & Water Division v. Craft*, 436 U.S. 1 (1978). The right to adequate notice is guaranteed by both the Due Process Clause of the Fourteenth Amendment and by the "law of the land" provision, Article I, Section 8, of the Tennessee Constitution. *See generally*, *State v. Russell*, 227 Kan. 897, 610 P.2d 1122, *cert. denied*, 449 U.S. 983 (1980).

This Court has recognized the important role that adequate notice plays in securing due process and has, accordingly, provided that adequate notice must be had as a matter of right. Thus, this Court's Rule 8.2 and Rule 8.05 of the Tennessee Rules of Civil

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judge who might sit on this case." (SC-49, p. 136). Regardless of how this equivocal statement might be interpreted, it addresses appellant's *own* view of the fairness issue; a separate concern from the issue of whether Chancellor Inman should have disqualified himself, *sua sponte*.

Also, there can be no waiver of bias where a judge has not made a full disclosure. *Hall v. Small Business Administration*, *supra*, 695 F.2d at 180. Important facts bearing on bias were not disclosed by Chancellor Inman. For, in May 1988, appellant learned for the first time that Chancellor Inman served as prosecutor in the Court of the Judiciary in the proceedings against Judge Jenkins of Knoxville which were in progress during the pendency of appellant's case. As prosecutor, Chancellor Inman surely was required to defend the jurisdiction of the Court of the Judiciary over a Constitutional officer, a question correlative to a critical issue in appellant's case. See Section I, *supra*. Had appellant known in 1987 that Chancellor Inman was the prosecutor in the Jenkins case he would have moved to disqualify Chancellor Inman from his own case.

[26] *Accord*, *Twining v. New Jersey*, 211 U.S. 78, 110-11 (1908); *Baldwin v. Hall*, 68 U.S. (1 Wall.) 223 (1864); *see Bendix Corp. v. Federal Trade Commission*, 450 F.2d 534 (6th Cir. 1971).

Procedure, (which are made applicable to disciplinary proceedings by the Board of Professional Responsibility pursuant to Supreme Court Rule 23.3.) mandate that adequate notice be provided.[27] *See also, Birdsell v. State*, 205 Tenn. 631, 330 S.W.2d 1 (Tenn. 1959); *McKee v. Board of Elections*, 173 Tenn. 276, 116 S.W.2d 1033 (1938).

The Petition for Discipline failed to meet the minimal standards of adequate notice and thus deprived appellant of the due process that was owed him. The Petition is not only lacking in the requisite clarity and specificity, but is so contradictory and vague as to be fundamentally unfair. As a result, these proceedings have been constitutionally tainted from their inception.

The Petition's flaws are manifest. The Petition consists of four distinct sections. The first two paragraphs assert that appellant practices law in Tennessee and that he is subject to discipline by the Board of Professional Responsibility. The next ten paragraphs (numbered three through twelve consecutively) ostensibly provide the predicate facts upon which the charges of violations of particular Disciplinary Rules are based.

Paragraph 18, titled "Alleged Violations" charges that appellant's "acts and omissions" violated T.C.A. § 23--3-201 and ten different Disciplinary Rules -- DR 1-102(A)(1)(4)(5) and (6);

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[27] Tennessee Supreme Court Rule 8.2 provides, in pertinent part:

> "Formal disciplinary proceedings shall be instituted by Disciplinary Counsel by filing with the Board a petition *which shall be sufficiently clear and specific to inform the respondent of the alleged misconduct.*" (emphasis added).

Similarly, Tennessee Rule of Civil Procedure 8.05 provides, in pertinent part:

> "(1) ... every pleading stating a claim or defense relying upon the violation of a statute shall, in a separate count or paragraph, either specifically refer to the statute or state all the facts necessary to constitute such breach so that the other party can be duly apprised of the statutory violation charge. The substance of any ordinance or regulation relied upon for claim or defense shall be stated in a separate count or paragraph and the ordinance or regulation shall be clearly identified. *The manner in which violation of any statute, ordinance or regulation is claimed shall be set forth.*" (emphasis added).

DR 5-101(A); DR 7-106(A); DR 7-106(C)(5), (6), and (7); and DR 8-102(B).

The intervening paragraphs, in particular paragraphs 13, 14, 15, and 17, are evidently designed to link the factual allegations of paragraphs three through twelve with the particular Rule violations listed in paragraph 18. These four short intervening paragraphs are so disordered and vague, however, that rather than providing appellant with a comprehensible notion of exactly what he is charged with and exactly what Rules he has supposedly violated and in what ways, they represent instead a billboard of confusion. An analysis of each of these four "linking" paragraphs reveals the inadequate notice provided by the Petition.

a. **Paragraph 13** -- This paragraph charges that appellant's "*pattern of convictions* for being in contempt of court set forth in paragraphs (3) through (12)" constitutes violations of five separate Disciplinary Rules – DR 1-102 (A) (5), DR 7-106 (A) and DRs (C) (5), (C) (6), and (C) (7) (emphasis added).

It is not clear what is meant by this charge. Is it that appellant's "pattern of convictions" constitutes a violation of five different Rules or, in the alternative, that each of the allegations listed in paragraphs 3 - 12 separately amounts to violation of all five Rules. As explained in IV, 1, *infra*, a "pattern of convictions" is not a substantive offense. In addition, paragraph 13 does not delineate which Rule was violated in which manner and which of the ten predicate paragraphs constituted violations of a particular Rule. Indeed, it is by no means clear how many, if any, of the ten predicate paragraphs actually concern the five aforementioned Rules.

For example, DR 7-106 [28] is specifically concerned with, as its title "Trial Conduct" plainly indicates, the actions of an attor-

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[28] DR 7-106 provides, in pertinent part:

"(A) a lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such a rule or ruling."

ney during the course of a pending *trial*. It must be asked, in what respect do paragraphs 5, 7, 8 and 10 have anything to do with a violation of that particular Rule. Paragraphs 5, 7, 8, and 10 concern comments made by appellant to the public and reprinted in the public press. Not a single one of those comments was made during the course of a trial and not a single comment even conceivably affected, let alone interfered with, anyone's trial conduct. There is no specific allegation that, in fact, these comment's even related to appellant's conduct in court. One must indeed wonder how post-trial comments could ever affect the conduct or outcome of the trial.

DRs 7-106 (C) (5), (C) (6), and (C) (7) also concern "Trial Conduct". Again it is far from clear how appellant's post-trial comments, made outside of court, in any way concern the conduct of a trial, in general, or appellant's conduct during a trial, in particular. Further, it is unclear how such comments constituted, for example, "undignified or discourteous conduct which is degrading to a tribunal." DR 7-106(C)(6). Was appellant to infer that his request to be listed in the Guiness Book was somehow "discourteous" to a tribunal? Was that statement an example of his "fail[ure] to comply with known local customs of courtesy ... ?" Were the events for which appellant was held in contempt regarding a noisy chair and a slammed door (*see* Petition paragraphs 4 and/or 6) an example of how he "intentionally or habitually" violated established rules of civil procedure or rules of evidence? Is there any indication or specification, any delineation of what rule of procedure or evidence was violated? Is there any specification, any delineation, indeed, any hint of what rule of evidence or procedure was violated? Additionally, is there any indication that such actions were done "intentionally or habitually"?

Finally, paragraph 13 alleges that appellant's "pattern of convictions" was a violation of DR 1-102 (A) (5), *viz.*, that he "engage[d] in conduct that is prejudicial to the administration of justice." In what manner, in what respect did appellant's actions, which ranged over a five-year period and consisted of everything from non-verbal conduct in a courtroom to public, post-trial

remarks that were constitutionally protected,[29] amount to conduct that was "prejudicial to the administration of justice"? Most pointedly, how is one supposed to prepare to rebut such nonspecific and disjointed charges? How was appellant supposed to comprehend in what manner he had prejudiced the administration of justice? The questions answer themselves.

**b. Paragraph 14** -- This paragraph charges that appellant's "remarks to the public as evidenced in paragraphs (3) through (12) of this petition and the exhibits attached thereto, as well as exhibit K to this petition, are gross, disrespectful, knowingly false, derogatory, and damaging to the legitimacy of and trust in the judicial system -- in violation of DR 1-102(A)(5) and 8-102(B)."

DR 1-102 (A) (5) forbids an attorney from engaging in "*conduct* that is prejudicial to the administration of justice" (emphasis added); DR 8-102 (B) prescribes that "a lawyer shall not *knowingly* make *false accusations* against a judge ... ." (emphasis added).

Paragraph 14 hardly makes clear which of appellant's public remarks were "gross, disrespectful, knowingly false, derogatory, and damaging to the judicial system." For example, which comments were "gross", and by what standard were they deemed so? Similarly, appellant had a need to know, indeed, a due process right to know, which comments "knowingly false ... accusations", and which comments rose to the level of "conduct" that prejudiced the administration of justice.

**c. Paragraph 15** -- This paragraph avers that appellant's "independent professional judgement is impaired in his representation of the state due to his personal conduct with Judge James Scott. Respondent is thereby in violation of DR 5-101(A) *for continuing to represent the state* in such a situation." (emphasis added).

DR 5-101, which is titled "*Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment*", (emphasis added), provides, in pertinent part:

> "(A) Except with the consent of his client after full disclosure, a lawyer *shall not accept employment* if the ex-

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[29] *See* § III, *infra*.

> ercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."

It is not clear how this Rule applies, in any manner, to appellant's conduct. It is not clear what precisely appellant is charged with. Is he charged with "*continuing* to represent the state", as alleged in the text of paragraph 15, or is he charged with "*accept[ing]* employment" when he should have "refus[ed]" to do so, as required by the language of the Rule referenced in paragraph 15? Which one is it? If the former, what Disciplinary Rule was violated? If the latter, what was the new "employment" supposedly "accept[ed]" by appellant?

The fact is, there is no Disciplinary Rule that covers the situation complained of, nor, as far as we know, any case or other authority that suggests that any attorney, let alone an elected public official, has an ethical obligation to withdraw from a particular case because of animosity with a particular judge, or a duty to never again appear before that judge -- to cease "continuing to represent that state in that situation" -- because of such animosity. But this statutory omission does not warrant the *ad hoc* creation of a new substantive offense, one that stretches the law to fit the facts.

Moreover, paragraph 15 alleges that the appellant's "professional judgment is impaired ... due to his personal conduct with Judge James Scott." Two questions need to be asked. First, in what respect, in what manner, and to what extent or degree was appellant's "professional judgment ... impaired"? The Petition provides not a clue. Second, what was the "*personal* conduct", as opposed to the ongoing *professional* conflict with Judge Scott, that produced such unspecified impairment? Once again, the most diligent parsing of the Petition yields nothing. Curiously, paragraph 15 does not even incorporate by reference paragraphs 3 through 12, as paragraphs 13 and 14 had. What paragraph 15 truly amounts to is a call for a District Attorney General to quit his job, to ban himself whenever he is in conflict with a judge, or risk sanction for violation of the Disciplinary Rules. If this charge is constitutionally adequate, if this charge is sufficient to provide

appellant with notice, one must wonder whether there is any attorney in this state whose unspecified "personal conduct" can withstand review. Paragraph 15 is not only vague, it is so vague and so untethered to any alleged facts as to constitute to wholly inadequate notice.

**d. Paragraph 17** -- Finally, paragraph 17 of the Petition states that appellant's:

> "actions and omissions [sic] set forth in paragraphs (3) through (12) of this petition further involved [sic] conduct adversely reflecting upon [appellant's] fitness to practice law, unprofessional conduct, and conduct rendering [appellant] unfit to be a member of the Bar. [Appellant] has hereby [sic] violated DR 1-102(A)(1)(5) and (6) and T.C.A. Sec. 23-3-201(5)."

DR 1-102(A) provides, in pertinent part, that "a lawyer shall not (1) violate a disciplinary rule ... (5) engage in conduct that is prejudicial to the administration of justice [and] (6) engage in any other conduct that adversely reflects on his fitness to practice law." With regard to DR 1-102(A) (1), it is not clear why appellant was charged with the violation of this Rule. At best, it seems tautological to charge that an attorney has "violate[d] a disciplinary rule" because he "violate[d] a disciplinary rule"; surely, this could lead to endless mischief. It is conceivable, however, that this allegation refers to another Disciplinary Rule, DR 1-102(A) (4) which was incorporated in paragraph 18 of the Petition.

DR 1-102(A) (4) specifies that "A lawyer shall not ... engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Appellant had no way of determining what was the factual basis for this charge. Indeed, it was not clear that he had been charged with the violation of this Rule. On the one hand, nothing in "factual" paragraphs 3 - 12 refers to fraud and dishonesty. On the other hand, as discussed above, this kind of omission was hardly unusual. To this day, it is not clear whether the Disciplinary Counsel erred in omitting the predicate facts in support of this charge or whether he erred in including a charge that had no factual basis and may not have been intended to have been in-

cluded in the Petition, that is, whether the oversight was one of inclusion or exclusion. In either event, appellant had no way of knowing what type of error had been made, no way of knowing whether he had to defend himself against these charges, and no reasonable opportunity to prepare a defense against allegations that would, in any other context, constitute criminal or quasi-criminal behavior.

As for the other charges incorporated in paragraph 18, DRs 1-102(A) (5) and (6) -- "conduct that is prejudicial" and "any other conduct that adversely reflects on ... fitness to practice" -- we note that this is the *third* time that the Petition charged the appellant with violation of these two Rules. Repetition did not reveal the factual basis for these charges; nor did repetition make these charges any clearer; nor did repetition render notice of these charges constitutionally any less infirm. If the appellant or any other attorney can be disciplined and suspended from the practice of law on the basis of such vague and skeletal charges then "due process" has become a meaningless form of words.

**3. Denial of a True De Novo Hearing.**

Section 27-9-111(d) of the Tennessee Code required the Chancellor to "weigh the evidence and determine the facts ... ." He was required to "redetermine" both the facts and the law. *Cooper v. Williamson County Board of Education*, 746 S.W.2d 176, 182 (Tenn. 1987); *see Berke v. Chattanooga Bar Ass'n*, 436 S.W.2d 296, 304 (Tenn. Ct. App. 1968) (appellate *de novo* review of attorney disbarment, "means that all the evidence must be reviewed"). He was required to do so without regard to the action of the Hearing Panel. *Case v. Carney*, 213 Tenn. 597, 376 S.W.2d 492, 496 (Tenn. 1964). Finally, and most importantly, he was required to "affirmatively show" that he weighed the evidence before him. *Ewin v. Richardson*, 214 Tenn. 628, 382 S.W.2d 532 (Tenn. 1964).

Before Chancellor Inman, appellant presented serious legal and factual issues for resolution including: (1) whether Rule 9 applied to him; (2) the bias of the Hearing Panel; (3) whether acts or events occurring before 1983 could be considered; (4) the

precise charges against appellant; and (5) whether statements made by appellant were protected by the First Amendment. (SC-49, pp. 1-5).

Chancellor Inman did not "redetermine" facts and law. He did not "affirmatively show" that he weighed the evidence. He did precisely the opposite -- he rubber-stamped the actions of the Hearing Panel. This violated due process and Tennessee law.

Throughout the proceedings leading up to the Chancellor's review of the case, appellant repeatedly raised all of the issues set forth above, as well as other serious questions about the facts or the legal setting in which his case was being prosecuted. For instance, he claimed -- and documented -- that the Panel was possibly biased against him because of having cases pending before Judge Scott. (BF-26, 5/29/87, "Motion to Vacate" and exhibits thereto). This most serious allegation, going to the fundamental fairness of the proceeding, was not reviewed or examined at all by Chancellor Inman. Rather, it was dismissed by him in the sparsest prose, unadorned by reference to any authority: "The evidence concerning this issue is not very satisfactory -- one of the members may have had cases pending in the Circuit Court -- but it is not believed that this is a disqualifying factor." (SC-49, p. 200).

The difficult question of whether events prior to 1983 could be used against appellant was dealt with by Chancellor Inman in an even shorter sentence: "These convictions speak for themselves and this Court obviously has not authority to look behind them." (*Id.*, p. 201). This is flatly wrong. As this Court has recently held in *Cooper, supra*, the Chancellor not only had authority but the *obligation* to "look behind" such matters. Moreover, as *Ewin, supra*, specifies, he was required to "affirmatively show" that he had weighed the evidence on this issue (and all others as well).

Appellant raised the significant issue of whether disposition of previous complaints could be used against him. (*Id.*, p. 5). To this the Chancellor replied tersely: "Suffice to state that this instance is without merit, and will not be noticed further. Petitioner's prior disciplinary record must be considered." (*Id.*, p. 201). This is all the more mistaken because even the Panel was

unclear as to whether these prior acts could be used. (BF-18, 11/22/87, "Transcript of Proceedings", p. 7)

On the First Amendment issue -- on which the Panel itself agreed with appellant (BF-28, 4/8/87, "Findings and Judgment," p. 2) -- the Chancellor simply stated: "[Appellant's] ... pronouncements are simply not privileged." (SC-49, p. 201). Even though this represented a stark reversal of the Panel's decision, not one additional word of explanation was given.

Chancellor Inman concluded his opinion simply: "The findings of fact by the Hearing Panel are not seriously controverted, and are adopted by the Court. The decision of the Panel is affirmed." (*Id.*). But even this fundamental fact was mistaken: in truth, appellant seriously, vigorously, and repeatedly *did* controvert the Panel's findings.

Twenty-four years ago this Court struck down as inadequate findings which were almost identical to those of Chancellor Inman. In *Case v. Carney*, *supra*, the Chancellor, reviewing the denial of a liquor permit in the City of Nashville, opined: "The court finds that the Beer Permit Board of the City of Nashville did not act illegally, arbitrarily, capriciously or unreasonably in refusing to issue petitioner a permit." 376 S.W.2d at 492. This Court found that this bare conclusion fell far short of the affirmative showing that the Chancellor had weighed the evidence. It held:

> "The findings of the trial judge do not affirmatively show that he weighed the evidence contained in the record before him and tried the matter *de novo* as is required by law. He merely found that the Board did have a basis upon which to reach the result arrived at by the Board and in so doing the Board did not act arbitrarily, capriciously, illegally and in excess of its jurisdiction. This language shows that in this case the scope of judicial review now afforded by this statute was not had in the trial court." 382 S.W.2d at 534.

*Case* and *Ewin*, therefore, require that this Court find that Chancellor Inman violated appellant's rights under Tennessee law.

In the proceedings below, appellant averred that the Hearing Panel was tainted by at least an appearance of interest and bias. One reason this Court has identified for the importance of a *de novo* hearing is that such a hearing can cure bias by the administrative body whose decision is being reviewed. *Cooper v. Williamson County, supra*, 746 S.W.2d at 185. But the right so recently recognized in *Cooper* was denied appellant because the Chancellor simply did not conduct a *de novo* hearing. Not only was the appearance of interest and bias by the Panel not corrected by a *de novo* determination of the issues, but this appearance irremediably tainted the conclusions of Chancellor Inman as well.

**4. Denial of a True Judicial Determination**

The statutes and rules governing the Hearing Panel and Chancellor Inman (Supreme Court Rule 9, § 7.2; T.C.A. § 27-9-111) require that findings and conclusions of law be prepared and filed. Implicit in these mandates is a requirement for a *judicial* determination in its most exacting sense. Due process entitled appellant to an adjudication that comprehends a clear statement of the charge and conclusions, and the reasons therefore. Both the Panel and the Chancellor failed to do this: the Panel's Findings and Conclusions and Chancellor Inman's memoranda and judgment contradict each other, are internally contradictory, and are flawed by major factual and legal errors.

**a. The Panel Opinion**

The Panel opinion is vague and contains unexplained and unreconcilable contradictions. Also, the Panel totally misunderstood the record: it found appellant "guilty" of the so-called "Culbertson contempt," mistakenly believing that that event took place in April 1985 (BF-28, 4/8/87, "Findings and Judgment", p. 4). In fact, it is undisputed that the Culbertson incident did not occur in 1985, but *six years earlier, in 1979*. (BF-25, 3/16/87, "Transcript of Hearing, vol. I, p. 40; *see also*, BF-1, 8/29/85, "Petition", paragraph 6, Ex.D; SC-49, III, "Transcript of Proceedings", p. 66). This egregious mistake was compounded, as it led the Panel to mistakenly divine a "pattern" (BF-28, p. 5) between the 1983 grand

jury contempt and what it believed to be the "1985" Culbertson matter. As a result, appellant was convicted of a non-offense.

Contradictions include the fact that if appellant's public statements do not violate the Rules of Discipline because of his constitutional right of free speech, as the Panel concluded, how can the same comments then be used to be part of the basis of the "pattern" of misbehavior for which he was apparently convicted? If the previously adjudicated contempts were considered only as they related to the "pattern" of misconduct where the nature of any discipline that might be adjudged in the pending case, and if the Panel, "obviously had no jurisdiction to reopen or retry *any* of the prior cases" (*Id.*, p. 3) why then did it reopen the 1979 Culbertson matter? (*id.* at p. 4).

The Panel claimed that it was finding appellant guilty of a "pattern" of behavior in violation of the Disciplinary Rules (*id.* at 5) and a "pattern" of disrespectful behavior toward the Court. (*id.*) There are four reasons why this conclusion is fatally flawed. First, it amounts to the creation of a completely new substantive disciplinary rule, one proscribing a "pattern" of disrespect or a "pattern" of behavior; no such substantive offense exists under the Disciplinary Rules as written.[30] Second, the Panel apparently took into consideration appellant's public statements, although in the very same opinion it had determined that these remarks were constitutionally protected speech which did not violate the Disciplinary Rules. Third, the Panel considered, as part of the alleged pattern which the Panel believed existed, the *1979* Culbertson contempt incident (which the Panel mistakenly thought occurred in 1985).[31] Fourth and finally, although formal charges under the Disciplinary Rules had been filed against appellant by the Disciplinary Coun-

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[30] *See* § IV, *infra*.

[31] Also, acts occurring before 1983 were used by the panel as "part of [appellant's] professional record." (*Id.*) This is clearly improper. The Panel admitted as much. "With respect to the various adjudications of contempt, the panel concludes that all of these, save the incidents in 1983 and 1985, previously have been considered by the Board, and have been dealt with by dismissal or adjudication." (*Id.*)

sel, the Panel *never* made a specific reference to which of the Disciplinary Rules had been violated by appellant and exactly what acts amounted to a violation. He was, therefore, convicted of no specific offense; instead he was condemned for his overall conduct, his general character, his bad attitude.

Confusion of the Panel opinion, its non-specificity, and its gross errors of fact, made it impossible for appellant to obtain an appeal or for Chancellor Inman to conduct an adequate review. The Panel effectively entered a non-appealable order, and this violates due process.

**b. The Chancellor's Opinion**

Even though the Panel made a gross mistake of fact in believing that the Culbertson incident had occurred in 1985, when it in fact had occurred six years before, and even though this mistake was evident on the face of the record before Chancellor Inman, he simply refused to note, let alone correct, this mistake. As a consequence, his entire analysis of the case was marred by a gross factual mistake.

Moreover, even though the Panel claimed it would not take into account the pre-1983 incidents, Chancellor Inman nevertheless did so. This was a mistake of law. No explanation was offered by the Chancellor for this radical change, even though he was putatively conducting a *de novo* hearing.

In a similar vein, even though the Panel said that appellant's statements were protected by the First Amendment, Chancellor Inman, once more drastically changing the rules, said that they were not. (SC-49, p. 201) And, once more, he offered no explanation for this turnabout, just as he apparently did not rely on any authority. As with the Panel opinion, the Chancellor's opinion never listed the specific Disciplinary Rules which appellant violated.

The Supreme Court has condemned conclusory determinations of constitutional issues made in a fashion similar to those by Chancellor Inman. In *Wood v. Georgia*, 370 U.S. 375 (1962), the Supreme Court proscribed a determination by the Georgia Court

of Appeals that a defendant's statements would present the requisite "clear and present danger" to the administration of justice, where there was no evidence of record to support such a conclusion and where the appellate court did not acknowledge "even an awareness" of the applicable standards and did not conduct a review based on such standards. *See* 370 U.S. at 387-389. There are striking parallels to this case: in both *Wood* and appellant's case the reviewing court "simply adopted as conclusions of law the allegations made in the contempt citation", 370 U.S. at 387; and, in both of these cases "the court did not indicate in any manner *how* ..." the behavior inquired into was proscribed by applicable rules. *Id.* (emphasis added). Finally, in both *Wood* and this case, the record is effectively barren of findings which support the Court's legal conclusions. *See id.*

It appears that the Chancellor totally misunderstood his mandate. He was to conduct a *de novo* determination. But, he stated that he had no authority to look behind appellant's earlier convictions (SC-49, p. 201), when the opposite of course was true. Likewise, he offered no explanations for radical changes with respect to the use of prior adjudications and statements protected by the First Amendment. Finally, although appellant extensively disputed the accuracy of the Panel's findings of fact and law, the Chancellor, without further elaboration, merely stated: "The statements of findings of fact by the Hearing Panel are not seriously controverted." This was simply not supported by the record.

**5. Improper Use of Prior Allegations**

Due process was violated in still another way when past acts and allegations about appellant were improperly used by the Panel and Chancellor Inman.

One of the law's most honored principles is that when a man's present conduct comes under scrutiny, his past transgressions cannot be held against him except under specific and restricted circumstances. Another enduring principle of law is that a person cannot be put to the task of repeatedly defending himself against past allegations. This is reflected in the guarantee against double jeopardy found in both the Tennessee and federal Constitutions,

the principle of double jeopardy, the policy underlying the statute of limitations, and in the presumption of innocence in criminal cases recognized by both the Tennessee and United States Constitutions. These principles were violated in appellant's case.

In *Disciplinary Board v. Banks*, 641 S.W.2d 501 (Tenn. 1982), this Court adopted the holding of the Court of Appeals in *Berke v. Chattanooga Bar Ass'n*, 436 S.W.2d 296 (Tenn. App. 1968), which stated:

> "Former charges against lawyers which have been rejected by the courts should not remain for consideration in future cases. However, in the absence of exoneration, former misconduct must remain part of the professional record to be considered as part of the evidence of professional fitness or unfitness." 436 S.W.2d at 309.

In the present case this means that if prior allegations of misconduct or disciplinary complaints lodged against appellant were rejected by the Disciplinary Board[32] or no charges were filed by the Disciplinary Board, or if appellant was exonerated from them,[33] then they could be not used to decide appellant's substantive responsibility for disciplinary violations.

In appellant's case, the Petition alleged eight acts of prior misbehavior (BF-1, 8/29/85, Petition, Paragraphs 4-ll). But in *seven* of these eight incidents, either the First Amendment protected appellant from any proceedings against him, or no action was taken by the Disciplinary Board, or a disciplinary complaint or petition had been dismissed.[34] Specifically, with respect

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[32] Clearly, withdrawal of a complaint is the functional equivalent of "rejection by the courts."

[33] That is, unless an adjudication of guilt by a Disciplinary Board or Court was made. This is supported by *Banks*, in which a 1965 federal court fine and reprimand [for similar conduct] was properly admitted in a subsequent Disciplinary Board proceeding to show knowledge and degree of punishment.

[34] *See* Affidavit of Chief Disciplinary Counsel Lance Bracy. (SC-49, p. 145, paragraph 6).

to the incidents alleged in Paragraph 4, [door slamming incident] and Paragraph 6 [failure to answer Chancellor's questions regarding plea agreement process] the Board advised appellant, by letter on June 18, 1980, that the complaint regarding each incident was dismissed.

With respect to the incidents cited in Paragraph 9 [regarding information supplied by appellant to the grand jury], this was also concluded on June 30, 1982 by court decision which did not follow the Board's recommendation. (BF-1, 8/19/85 Petition, Ex. G, at pp. 6-7). The incidents alleged in Paragraph 5 [statement to press on February 23, 1979], Paragraph 7 [statement in the press on October 24, 1979], Paragraph 8 [letter reported in the press on March 30, 1981], and Paragraph 10 [statement in the press on December 3, 1981], are matters upon which the Board took no action, and which even the Hearing Panel decided were protected by the First Amendment and therefore could not properly be grounds for discipline. (BF-28, "Findings and Judgment," at 2). The Board also took no action prior to the filing of the instant petition on April 18, 1985 regarding the incident cited in Paragraph 11 [failure to answer question about grand jury] which occurred in 1983.

All that remains are Paragraphs 3 and 12 – both of which refer to the same 1985 incident in which Judge Scott ordered appellant to prepare a report, where appellant did so, and where Judge Scott was not satisfied with the quality of the report.

In this analysis, only a single, solitary incident, referenced in both Paragraphs 3 and 12, was properly before the Panel and Chancellor Inman. The other incidents, obviously influential and prejudicial in the minds of both the Hearing Panel and Chancellor Inman, should never have been brought to their attention. Because these incidents were presented and considered, however, appellant's due process rights were violated.

Inasmuch as the only proper use for these prior incidents was with respect to punishment, *see Banks*, *supra*, it is plain that the Disciplinary Counsel, the Panel, and the Chancellor went far beyond the bounds of law in using these incidents.

And because the Petition did, in fact, refer to prior incidents that should never have been brought to the attention of either the Panel or the Chancellor, the proceedings before both bodies were irredeemably tainted from their inception.[35]

The Petition should have contained no reference whatsoever to prior acts since such acts are only to be taken into account at the time of determination of a sanction, and not with respect to substantive guilt. Neither the Panel nor the Chancellor should even have been informed of these other incidents or allegations until *after* they had made an adjudication of appellant's responsibility for the single incident which was properly charged against him.

This has been made clear by the American Bar Association. The ABA's Model Standards for Lawyer Discipline ("ABA Standards") states:

> "*Prior disciplinary record.* Information regarding prior discipline of a respondent [lawyer] normally *should not be divulged* to a Hearing Committee until after there has been a finding of misconduct in the present matter." ABA Standard 8.39. (emphasis added).

The ABA's Standards' Commentary indicates that allegations of prior misbehavior, "should not be used as a substitute for proving the allegations at issue." *Id.* This is precisely what happened to appellant in this case. Accordingly, his right to due process was violated.

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[35] Thus, the situation is similar to that which would arise in a criminal case where an indictment improperly refers to prior offenses or acts committed by the defendant which are not subject to the present charges.

## III. ABRIDGMENT OF FREE SPEECH

It is difficult to fathom Chancellor Inman's conclusion that appellant may be disciplined on the basis of his "remarks to the public", remarks which the Chancellor declared, without any explanation or citation to authority, were "simply not privileged."

The Petition asserts that appellant made four impermissible remarks to the public and the press -- none of which had ever been the subject of or the basis for contempt citations and none of which had ever been the basis for or cited in any prior disciplinary proceedings.[36]

The Petition charged that appellant's "remarks to the public" were "gross, disrespectful, knowingly false, derogatory, and damaging to the legitimacy of, and trust in, the judicial system -- in violation of DR 1-102(A) (5) and [DR] 8-102." Petition, paragraph 14. Paragraph 17 additionally charged that appellant's "remarks to the public" constituted "*conduct* adversely reflecting upon [his] fitness to practice law, unprofessional conduct, and conduct rendering [him] unfit to be a member of the bar" and thus amounted to violations of DR 1-102(A) (1), (5), and (6), and T.C.A. § 23-5-201." *Id.* (emphasis added).

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[36] These remarks were as follows:

"[O]n February 23, 1979 appellant was reported as having stated to *The Oak Ridger*: 'My bottom line is that the judge is mucking up my cases and I can't stand for that.'" (Petition, ¶ 5);

"[O]n October 24, 1979 appellant was reported as having said to *The Oak Ridger*: 'I don't have time for this horse manure.'" (*Id.*, ¶ 7);

"On March 30, 1981 appellant wrote [sic] *The Guiness Book of World Records* requesting inclusion in same as 'The District Attorney with most contempt and disciplinary actions against him.'" (*Id.* ¶ 8); and

"On December 3, 1981 appellant was reported by *The Clinton Courier News* as having said of [the November 1981 recommendation by a Hearing Panel of the Board of Professional Responsibility that he be suspended for 90 days]: 'When I find that I'm suspended by Almighty God, I'll know that I'm guilty of wrongdoing, not before.'" (*Id.*, ¶ 10).

As discussed in § III, *supra*, the Petition failed to specify how or why any of the four remarks were "gross" or "knowingly false" or "derogatory" or "damaging to the legitimacy of ... the judicial system" or why these remarks constituted "conduct ... rendering [appellant] unfit to be a member of the bar." (Petition, paragraph 17). Moreover, as discussed in § IV, 2, *infra*, no evidence was presented that established that appellant's remarks were, in fact, "gross", "derogatory", etc., and no proof was adduced that these four remarks, made four and six years *before* the Petition in this matter was filed, rendered appellant "unfit" to practice law.[37]

In view of the complete absence of evidence and in further view of appellant's strongly voiced argument that his remarks were fully protected under the Freedom of Speech Clauses of the Tennessee and United States Constitutions, it is hardly surprising that the Hearing Panel determined that appellant's remarks did not provide grounds for discipline. Accordingly, although the Hearing Panel found that appellant's "statements [were] crude and unbecoming", it acknowledged that even such remarks were plainly within the protection afforded by Article 1, Section 19 of the Tennessee Constitution and by the Free Speech Clause of the First Amendment. As the Hearing Panel cogently explained: "[t]he right of free speech may not be absolute, but it does appear to be broad enough to protect [appellant's] expressions."

Chancellor Inman had a different and, it must be said, a decidedly mixed view of the rights of free speech enjoyed by appellant. On the one hand, he "adopted" the findings of the Hearing Panel and "affirmed" its decision, presumably including the Hearing Panel's opinion that all of appellant's remarks were constitutionally protected. Inman Memorandum Opinion, at 2. On the other hand, he concluded none of appellant's statements "which are critical of the Court" were constitutionally protected:

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[37] Given the seriousness of these charges, one must wonder why no court ever ordered appellant to show cause why he should not be held in contempt regarding these remarks, and why no disciplinary charges were ever previously filed respecting these remarks.

> "[Appellant] argues that his public utterances are constitutionally protected, and that he cannot be disciplined for making statements, to the Press or otherwise, which are critical of the Court. He denies one quote -- and the court accepts his denial -- but his other pronouncements are simply not privileged. The license of [Appellant] is onerated [sic] with the duty to act responsibly and respectfully to the system which he serves." *Id.*

Chancellor Inman never reconciled the contradiction between his own holding and that of the Hearing Panel. Nor did he cite reasons for his views; his opinion is lacking in any discussion of any authority, including, most pertinently, the decisions of this Court.

These omissions are all the more glaring because this Court's decision in *In re Hickey*, 149 Tenn. 344, 258 S.W. 417 (1923), is exactly on point and is the governing precedent in this state.

*Hickey* involved an appeal from an order in which an attorney was held in contempt and suspended for a pattern of defamatory and derogatory statements about a circuit judge, remarks that were repeatedly expressed to the press and public during the course of a political feud that stretched over a five year period. Appellant's oblique criticisms of Judge Scott pale in comparison with the strident calumnies that were the basis for discipline in *Hickey*.[38]

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[38] For example:

> — *Hickey repeatedly and publicly boasted* that "he had been largely instrumental" in the 1918 election of Judge Drinnon, and that he had said to existing and prospective clients that he "was in a position to get anything he asked of the court, and ... *that he controlled the court* ... ." 258 S.W. at 418;
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> — After Judge Drinnon ruled against one of Hickey's clients on a single procedural motion, Hickey became "'furious' and ... made derogatory statements about said ruling, and at various places and times had abused the court by reason of said ruling ... ." *Id.*

Hickey's most vociferous criticisms came in the form of an article which he wrote and which he paid to have published in a local newspaper "to the studied purpose to 'ruin and destroy'" the judge. 258 S.W. at 419. The article castigated Judge Drinnon in the harshest terms.[39]

On the basis of these and kindred remarks, Hickey was charged with contempt, in that he "intent[ionally]" and "wilfully" schemed to "disgrace", "interfere" with, and "injure" the court and "hinder" and "obstruct the course of justice." 258 S.W. at 419. *See id.* at 425. Upon evidence of such intent and upon proof that the administration of justice had been, in fact, obstructed, Hickey was found guilty of contempt. In addition, he was suspended from practice for "unprofessional conduct" and for "conduct which render[ed] him unfit to be a member of the bar." 258 S.W. at 427.

Hickey appealed to this Court. His defense rested on the same solid foundation as appellant's arguments below: "that in commenting on and criticizing on the manner in which" Judge Drinnon conducted the business of his court, he was "clearly within his constitutional rights, both state and federal." 258 S.W. at 423.

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— Hickey alleged that the judge was generally slothful and stupid and "*corrupt and partial* in his rulings." 258 S.W. at 419.

[39] For example:

— Hickey claimed that the judge was "not competent", that he was an "utter failure", that his court "has become a farce", and has "broken down", that the citizenry were "paying for nothing", and consequently that "there is a lack of respect for the law, respect for the judge ... ." 258 S.W. at 418-19.

— Hickey denounced the judge as an ignorant and incompetent dullard, remarking that the judge:

> "has never learned a thing; that he is lacking in judicial ability, that his courts drag, juries become disgusted and costs pile up. Civil litigation has practically stopped because he does not know how to try civil cases, and it has become necessary, to secure law enforcement, to have law enforcement societies formed for the purpose of protecting the public against violators of the law." 258 S.W. at 418.

This Court concluded that although an attorney could be held in contempt for "*direct personal misbehavior, for example, loud speaking or making any noise either in the courtroom or so near thereto as to interfere with the procedure of the court*" an attorney could *not* be held in contempt for "the effect that a newspaper article published at some remote place, might have" on those who happened to read it. 258 S.W. at 425 (emphasis added). Furthermore, and most pertinently, this Court held that an attorney could not be sanctioned for remarks that "apply to *suits that have been terminated, or to general criticisms of the court.*" *Id.* (emphasis added).

In support of its opinion, *Hickey* approvingly cited a long list of cases, each of which stood for the proposition that "'*when a case is finished, courts are subject to the same criticism as other people ... .*'" *Tate v. State*, 132 Tenn. 131, 177 S.W. 69, 72 (Tenn. 1915) (emphasis added), citing *Patterson v. Colorado*, 205 U.S. 454 (1907). In *Tate*, this Court noted that "court proceedings and the action of judges may be made the subject of criticism and full discussion *after a case is concluded.*" 177 S.W. at 72 (emphasis added).[40]

Similarly, the *Hickey* Court held that inasmuch as Hickey's constitutionally protected remarks could not supply the basis for a contempt citation, these same constitutionally protected comments could not be cited as proof of his "unfitness" to practice law. Indeed, the *Hickey* Court's opinion, far from being a grudging acknowledgment that attorneys have First Amendment rights to

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[40] The *Hickey* Court also cited *State of Oregon v. Kaiser*, 23 P. 964 (Or. 1908), in which the Oregon Supreme Court held that it lacked:

> "the authority to so punish anyone for criticizing the court *on account of* its procedure in *matters which have fully terminated*, however much its dignity and standing may be affected thereby, however unjust, rude or boorish may be the criticism or whatever may be its affect in bringing the administration of the law in disrepute."

*Hickey* also quoted approvingly from *Ex parte Green*, 81 S.W. 723 (Tex. 1904), and from Chief Justice Taft's opinion for the Court in *Craig v. Hecht*, 263 U.S. 255 (1923).

speak out on whatever issues they choose, reminded attorneys not only that they have a *right* to express their opinions but that they have a *duty* to speak out on issues of the day.[41]

*Hickey* remains good law in this state and *Hickey* compels the conclusion that appellant's remarks cannot be used as a basis for discipline. *Hickey*, of course, is also consistent with the great weight of modern authority. *See* note 44, *infra*.

Chancellor Inman's view of the rights of attorneys is simply mistaken. Attorneys are not second-class citizens, and theirs is not a "privilege" that is "onerated." Instead, "[l]awyers have First Amendment rights of Free Speech. ... They are first class citizens with many privileges not enjoyed by other citizens." *Hirschkop v. Snead*, 594 F.2d 356, 366 (4th Cir. 1979). Accordingly,

> *[i]t cannot seriously be asserted that a private citizen surrenders his right to freedom of expression when it becomes a licensed attorney* ... . The Supreme Court has built a substantial line of cases where the Constitution has been read to limit and restrain the state's power to prescribe standards of conduct for attorneys. In sub-

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[41] In thus emphasizing the positive good that resulted from the attorneys' comments on the state of the law and the state of the judiciary the *Hickey* Court approvingly cited, *inter alia*, *In re Hart*, 116 N.W. 212, (Minn. 1908), in which the Minnesota Supreme Court observed that:

> "members of the Bar have the best opportunity to become conversant with the character and efficiency of our judges. The rule contended for by the prosecution would close the mouths of all those best able to give advice, ... ."

The *Hickey* Court also quoted favorably from the Colorado Supreme Court's decision in *People v. Green*, 7 Colo. 237, 3 P. 65 (1883), in which that court observed that there is no difference between an attorney and any other citizen

> "so far as this liberty of speech in connection with judicial action is concerned ... . *He may* talk with his neighbors, and *comment freely upon the judge's official conduct in matters no longer pending, and he may criticize the same to the public press*; for such acts he will be answerable only as other citizens are."

Finally, the *Hickey* Court presciently observed, years before the Supreme Court of the United States came around to the same view, that there was no such thing as a "false" idea and that no action may lie and no sanction may be imposed

> stance, these decisions have held *only in those instances where misconduct threatens a significant state interest can a state restrict attorney's exercise of his rights under the constitution.*" *Polk v. State Bar of Texas*, 374 F. Supp. 784, 787 (N.D. Tex. 1974) (emphasis added) citing *Spevack v. Klein*, 385 U.S. 511 (1967); *NAACP v. Button*, 371 U.S. 415 (1963); and *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957).

As the United States Supreme Court and many state supreme courts have recognized, the rights to free expression -- to speak, to publish, to know -- are fundamental rights, ones that are absolutely critical to our democratic way of life. Thus, in reversing a contempt conviction based on out-of-court remarks, the Supreme Court observed:

> "[m]en are entitled to speak as they please on matters entitled to them; errors in judgment or unsubstantiated opinions may be exposed, of course, but not through punishment for contempt for the expression. Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgement of the right of free speech and assembly .... Hence, *in the absence of some other showing of a substantive evil actually designed to impede the course of justice in justification of the exercise of the contempt power to silence the petitioner, his utterances are entitled to be protected.*" *Wood v. Georgia*, 370 U.S. 375, 389 (1962) (emphasis added).

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on the basis of the content of such opinions. *See, Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). Thus, this Court stated:

> *"where [a]n article is published simply charging the court with being inefficient and incompetent, we cannot see that the court suffers injury, if the charge is untrue. Trial courts especially have little to fear from unjust criticism of this nature.*

258 S.W. at 429 (emphasis added).

This view is, of course, consistent with the Tennessee Constitution. Article 1, Section 19 of the Tennessee Constitution provides, in pertinent part:

> "the free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may speak, write, and print on any subject, being responsible for the abuse of that liberty."

Indeed, this Court has interpreted that Article as providing safeguards that are "substantially stronger" than those furnished under the First Amendment to the Federal Constitution. *Press, Inc. v. Verran*, 569 S.W.2d 435, 442 (Tenn. 1978).

As far as lawyers are concerned, the free speech rights guaranteed by the Tennessee and the United States Constitutions serve two distinct purposes. First, the First Amendment furthers the ability of an attorney to fulfill his ethical obligation to "represent his client zealously". Supreme Court Rule 8, Canon 7. Accordingly, within the courtroom and while a case is pending, an attorney is entitled to speak freely, vigorously, and even obnoxiously. Attorneys are

> "given great latitude in the area of vigorous advocacy. Appellate courts must ensure that all judges ... are not left free to manipulate the balance between vigorous advocacy and obstructions so as to chill effective advocacy when deciding lawyer contempts ... . *Attorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting on their client's behalf.*" *Hampton v. Hanrahan*, 600 F.2d 600, 648 (7th Cir. 1979) *rev'd on other grounds*, 446 U.S. 759 (1980) (emphasis added),[42] quoting *In re*

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[42] *See also State v. Russell*, 610 P. 2d 1122, 1126 (Kan. 1980), "a person's constitutional right to freedom of speech ... is no less by reason of having received a license to practice law.": *In re Gorsuch*, 76 S.D. 191, 75 N.W.2d 644 (S.D. 1956). *See generally, United States v. Myer*, 346 F. Supp. 973, 979 (D.D.C. 1972).

*Dellinger*, 461 F.2d 389, 398, 400 (7th Cir. 1972) (emphasis added).

In fact, lawyers are permitted and indeed encouraged to criticize both the state of law and the judiciary, in general, and the decisions by courts, in particular, even while litigation is pending. *See Hickey*, 258 S.W. at 423-26. "We start with the proposition that lawyers are free to criticize the state of the law." *In re Sawyer*, 360 U.S. 622, 631 (1959). Not only are lawyers permitted to freely comment on the state of the law, they are allowed to comment freely on the quality of judges and even on the merits of particular rulings. If a judge is

> "said to be wrong on his law, it is no matter; appellate courts and law reviews say that of judges daily, and it imputes no disgrace. Dissenting opinions and our reports make petitioner's speech seem like tame stuff indeed ... . The public attribution of honest error to the judiciary is no cause for professional discipline in this country." *In re Sawyer*, 360 U.S. at 635.[43]

It is therefore clear from the Supreme Court's "contempt cases" that the "First Amendment does not authorize restrictions on 'pure speech' merely for the purpose of protecting judges from criticism." *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 257 (7th Cir. 1975), *cert denied sub nom.*, *Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976), citing *Bridges v. California*, 314 U.S. 252, 273 (1941). The fundamental notion is that the people, as the ultimate sovereign, have both the right to hear criticism and the ability to winnow the wheat from the chaff, to separate what is correct and useful criticism from that which is false and damaging. Accordingly, the judiciary is entitled to no special

[43] A few years earlier the Supreme Court observed "citizens have a right under our constitutional system to criticize government officials, agencies and any government officials in agencies. Courts are not, and should not be, immune to criticism." *Konigsberg v. State Bar of California*, 353 U.S. 252, 269 (1957). That admonition is incorporated in Ethical Consideration ("EC") 8-6: "a lawyer as a citizen has a right to criticize [adjudicatory] officials publicly ...", citing *Konigsberg*, *supra*.

immunity from criticism. *Bridges v. Calif*, 314 U.S. 252, 270-271 (1941)[44]

Of course, the right of free speech guaranteed to lawyers is not wholly without limitation. Those limitations, however, are not fixed, "bright-line rules". Rather, the determination of what can be said, where it can be said, when it can be said, and in what manner it can be said -- in short, what is permissible and what is not -- turns on a careful balancing of the interests that are served by silence and those served by speech. *See, e.g., Hirschkop v. Snead, supra*, 594 F.2d at 363; *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). This Court has, of course, used the same balancing test whenever the rights of free speech are threatened by governmental action. *H & L Messengers, Inc. v. City of Brentwood*, 577 S.W. 2d 444 (Tenn. 1979).

There are, without question, important and substantial governmental interests that can be damaged or interfered with by an attorney's conduct or comments.[45] Society's interest insuring

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[44] *See also Eisenberg v. Boardman*, 302 F.Supp. 360, 362 (W.D. Wis. 1969) (three-judge panel) ("persons who make derogatory statements about judges are protected by the first and fourteenth amendments from imposition of civil and criminal liability, unless the statement is made 'with knowledge that it was false or with reckless disregard of whether it was false or not'", citing *New York Times, supra*, 376 U.S. 254, 280 and *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); as noted above, numerous state courts have similarly viewed criticism of judges as protected by the First Amendment and by comparable free speech provisions of their own state constitutions. *See State of Nebraska ex rel. Nebraska State Bar Association v. Michaelis*, 316 N.W. 2d 46, 52 (Neb. 1982); *Kentucky Bar Association v. Heleringer*, 602 S.W. 2d 165 168 (Ky. 1980); *Committee on Professional Ethics v. Horak*, 292 N.W. 2d 129, 131 (Iowa 1980) (an attorney "'should avoid undue solicitude for the comfort or convenience of judge or jury'", quoting EC 7-36; *State Bar of Texas v. Semaan*, 508 S.W. 2d 429, 432 (Tenn. 1974) *In re Meeker*, 385 U.S. 449 (1966); *Florida Bar v. Calhoon*, 102 So. 2d 604 (Fla. 1958).

[45] Thus, for example, an attorney who falsely charged a judge with membership in a criminal conspiracy would probably be subject to contempt and disciplinary sanction; so would a lawyer who wantonly alleged that a judge had been bribed. Moreover, even if an attorney did not impugn the character or the integrity of the court he still might be subject to contempt and discipline if his comments were intended to and actually did obstruct the progress of a trial. Thus, any comments that actually obstructed a trial or presented a "clear and present

with that a trial is not obstructed lasts, however, only as long as that trial is pending. Accordingly, courts refuse to discipline attorneys who criticize rulings of judges *after litigation has terminated*, as, by definition, *post-trial comments cannot obstruct a trial*. In brief, once a trial is concluded, the state's legitimate and substantial interest in making sure that that trial is not obstructed vanishes. *See, e.g., Pennekamp*, 328 U.S. at 334, 348; *Wood v. Georgia*, 370 U.S. at 380-81, 384-85.

The Petition, of course, did not allege that appellant obstructed any trial. Nor was any evidence presented that any obstruction of justice occurred. Lastly, neither the Hearing Panel nor Chancellor found that appellant's comments hindered, obstructed, or, in any fashion, interfered with any judicial proceeding. Nor were there ever any allegations, evidence, proof, or findings that appellant's conduct and comments in any way presented a "clear and present danger" of obstruction. Thus, it is important to emphasize "that this case does not present a situation where an individual is on trial; there was no 'judicial proceeding pending' in the sense that the prejudice might result to one litigant or the other by ill-considered misconduct aimed at influencing the outcome of a trial or a grand jury proceeding." *Wood v. Georgia*, 370 U.S. at 389.[46]

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danger" of obstruction would lie beyond the sanctuary provided by the First Amendment. *See, e.g., Pennekamp v. State of Florida*, 328 U.S. 331, 347 (1946); *Chicago Council of Lawyers*, 522 F.2d at 249 ("only those comments that pose a 'serious and imminent threat' of interference with the administration of justice can be constitutionally proscribed"); *Russell*, 610 P.2d at 1126.

[46] Moreover, it is equally apparent that neither the Disciplinary Counsel nor the Chancellor took into account appellant's very strong countervailing interests, both as an individual citizen, and more importantly, as an elected public official. In *Pennekamp*, *supra*, the Supreme Court was called upon to consider comments that had been made during the course of pending litigation, comments that allegedly obstructed and interfered with an ongoing trial. While acknowledging that "public comment of every character on pending trials or legal proceedings may [not] be as free as a similar comment after disposal of the litigation" the Court emphasized that

Neither the Disciplinary Counsel nor the Chancellor took into account the right of appellant to make his comments or the right of the citizens who elected to him to hear them. As this Court has observed, the First Amendment embraces not only the right to speak, to publish, and to print, but also the right to circulate, to receive, and to read. *H&L Messengers, supra*, 577 S.W.2d at 453.

The electorate of Anderson County has as much of a right to hear appellant's remarks as he has to make them. As the Supreme Court has consistently affirmed: "the protection afforded [by the Free Speech Clause of the First Amendment] is to the communication, to its source and to its recipients both." In this way, the First Amendment fulfills its second, instrumental or functional, purpose, that of informing the public and thereby facilitating democratic government. *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 756 (1976). *See also Kleindienst v. Mandel*, 408 U.S. 753, 762-64 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J. concurring). The public's interest in hearing comments, particularly about the affairs of government, runs to the very essence of the First Amendment, a major purpose of which is to promote the free discussion of exactly such governmental affairs. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). Certainly it must be acknowledged that among those governmental affairs that are of principal concern to the electorate is the operation of the judicial system.

In short, what is at stake with regard to the comments made by appellant is not only his own right to speak, but the right of the public to obtain the information it needs for appraisal in regula-

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> "free discussion of the problems of society is a cardinal principle of Americanism – a principle which all are zealous to preserve. Discussion that follows the termination of the case may be inadequate to emphasize the danger to public welfare posed by supposedly wrongful judicial conduct."

*Pennekamp*, 328 U.S. at 340 (footnotes omitted). *A fortiori*, comments that are made *after litigation has concluded* are equally important to the public's evaluation of the administration of justice. Such comments after litigation can hardly interfere with but only improve such administration.

tion of the judicial system. *Jacoby v. State Bar of California*, 19 Cal. 3d 359, 138 Cal. Rptr. 562 P.2d 1326, 1333 (1977). *See also State Bar of Texas v. Semaan*, 508 S.W.2d at 432-33; *State of Kansas v. Nelson*, 504 P.2d at 216.

It is respectfully submitted that this Court's opinion in *Hickey* forecloses any discipline of appellant for any comments alleged in the Petition. Moreover, since those remarks are absolutely privileged they cannot be used against him in any fashion to support substantive offenses against him.

Chancellor Inman's conclusion that appellant's remarks were "simply not privileged" was integral to his decision to uphold the 180 day suspension recommended by the Hearing Panel and imposed by the Board. On the authority of *Hickey*, that ruling cannot stand. Resultantly, Chancellor Inman's decision must be vacated.

## IV. THE EVIDENCE WAS INSUFFICIENT

As discussed in § III, *supra*, when incidents prior to 1983 are removed from consideration, as the Hearing Panel concluded they should have been, only one incident remains to make out the alleged "pattern" of misbehavior and disrespectful conduct charged in the Petition.[47] It is respectfully submitted, however, that even if the pre-1983 incidents could legitimately be grounds for discipline, appellant still could not disciplined on the basis of the "pattern" found in these disparate incidents, as a "pattern" is not a substantive offense warranting sanctions under the Disciplinary Rules. Furthermore, no evidence was presented and no proof adduced sufficient to find that appellant had violated any of the Disciplinary Rules listed in the Petition.

### 1. "Pattern" is Not a Substantive Offense

Due process requires that a person convicted of a pre-existing law or regulation, not one made up after the fact. *See, e.g., Spring Hill Cemetary, Inc. v. Lindsey*, 162 Tenn. 420, 37 S.W. 2d 111 (Tenn. 1931); *see generally*, United States Constitution, Art. I, § 9, cl. 3; Art. I, § 10, cl. 1.

Due process also requires that a person be convicted of a specific substantive charge, with clearly defined elements. *See Russell v. United States*, 369 U.S. 749 (1962); *United States v. Debrow*, 346 U.S. 374 (1953); *United States v. Simmons*, 96 U.S. 360 (1878).

In this case, both the Hearing Panel and the Chancellor labored under the mistaken impression that a "pattern" of misbehavior was actually a substantive offense under the Disciplinary Rules and, so believing, found that appellant had engaged in conduct that amounted to such a pattern. They were wrong, both as a matter of law and as a matter of fact.

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[47] Of course, "two of anything do not generally form a 'pattern'." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n. 14 (1985). *A fortiori*, one incident cannot a pattern make.

Nowhere in the Disciplinary Rules is there a reference to the substantive standard or a "pattern" of misbehavior or a "pattern" of disrespect or a "pattern" of contempts. Instead, the Hearing Panel and the Chancellor created this substantive standard out of whole cloth. This clearly violates due process. The Hearing Panel and the Chancellor apparently "imported" the "pattern" offense from the American Bar Association's Model Standards for Imposing Lawyer Discipline. Significantly, neither this Court nor the Tennessee Legislature has ever seen fit to promulgate or adopt these standards. Moreover, these Model Standards, by their express terms, are applicable only *after* an attorney has been found to have a Disciplinary Rule, and cannot be used as a surrogate for the Rules themselves. Thus, § 9.21 of the Model Standards for Imposing Lawyer Discipline refers to "Aggravating Factors including ... a pattern of misconduct ... ." Therefore, while a pattern of misbehavior is part of the calculus that may be used in imposing a sanction, it is not, by itself, a substantive standard against which a lawyer's behavior can be measured.[48]

The Hearing Panel erroneously relied on a standard that has not been recognized in this state and a standard which cannot be used as a substantive measure of an attorney's behavior. The Panel converted a sentencing factor into a substantive standard of behavior. This mistake was repeated and affirmed by Chancellor Inman. As a consequence, appellant was found to have violated a Rule that did not exist, in clear derogation of due process.

**2. The Burden of Proof Was Not Sustained**

As discussed in § III, *supra*, the Petition failed to specify exactly what actions and statements by appellant violated a particular disciplinary rule and what were the particular predicate acts that violated a particular rule.

A review of the evidence presented to the Hearing Panel and to Chancellor Inman additionally reveals that no evidence was

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[48] We would also note that the ABA Standards have not been adopted by the State of Tennessee.

presented and no proof established regarding the great bulk of the disciplinary violations charged.

Thus, of the ten Disciplinary Rules putatively violated by appellant, no evidence has been presented, let alone proved, with regard to at least seven such Rules:

**a. No evidence has been presented and no proof adduced that Appellant has violated DR 5-101(A)**

DR 5-101(A) provides that:

> "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."

This "conflict of interest" rule forbids an attorney from representing a client whose interests are adverse to those of another client's or adverse to his own personal or financial interests, absent "consent of his client after full disclosure ...." *Id.* As a matter of law, this Rule has no application to full-time government attorneys, such as appellant, whose only "clients" are the people who elected him. As a matter of evidence, no allegation was made and none proven that appellant's own interests were in conflict with or adverse to the interests of his clients and that his clients themselves had interests in conflict. Moreover, the record is bare as to what new "employment" appellant has "accept[ed]", or in what respect the "exercise of his professional judgment" had been or even could have been impaired or "affected". *Id.*[49]

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[49] Judicial opinions invoking DR 5-101 (A) invariably concern two types of situations: *one*, an attorney's acceptance of employment without disclosure of personal financial and property interests, *see, e.g., In re Roache*, 446 N.E.2d 1302 (Ind. 1983) (lawyer purchased business for himself while negotiating purchase of business for his client), *Florida Bar v. Jameison*, 426 So.2d 16 (Fla. 1983) (lawyer improperly encouraged client to invest in charitable foundation operated by lawyer), *Attorney Grievance Commission v. Collins*, 295 Md. 532, 457 A.2d 1134 (1983) (lawyer arranged purchase of and drafted contract regarding liquor license from enterprise in which he was a partner), *Dixon v. State Bar*, 32 Cal. 3d 728, 187

**b. No evidence has been presented and no proof adduced that Appellant has violated DR 7-106(C)(5)**

DR 7-106 provides, in pertinent part:

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

. . .

(5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal *without giving to opposing counsel timely notice* of his intent not to comply.

There is absolutely nothing in the record of this case that reflects that appellant at any time failed to comply with "known local customs" without giving "timely notice" to "opposing counsel". *Id. Compare, e.g., Ruggiero v. Attore*, 366 N.E.2d 470, 474-75 (Ill. 1977) (failure to advise opposing counsel's standing of scheduled hearing and *ex parte* order against that counsel's client); *George F. Mueller & Sons, Inc. v. Ostrowski*, 313 N.E.2d 684, 689 (Ill. Dist. 1974) (failure to inform visiting judge of local custom regarding telephoning of opposing counsel before entering *ex parte* order). *See also*, ABA Model Rules of Professional Conduct

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Cal. Rptr. 30, 653 P.2d 321 (Cal. 1982) (attorney impermissibly purchased interest of client without client consent), and *In re Shaw*, 443 A.2d 670 (N.J. 1982) (lawyer "purchased" client's personal injury case); and *two*, an attorney's acceptance of representation adverse to the interest of an existing client; *see, e.g., Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339 (9th Cir. 1981) (lawyer accepted employment requiring him to initiate litigation on behalf of new client against existing client), *In re Hansen*, 586 P.2d 413 (Utah 1978) (accepting employment from client's opponent in a civil proceeding in order to defend opponent in a criminal case), and *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976) (attorney was a partner in two firms in two cities; one firm represented plaintiff in one antitrust action, the other represented defendant in a different but similar suit). *See also, International Business Machines v. Levin*, 579 F.2d 271 (3d Cir. 1978); *Fund of Funds, Ltd. v. Arthur Anderson & Co.*, 567 F.2d 225 (2d Cir. 1978). *See generally*, "Developments in the Law – Conflicts of Interest in the Legal Profession", 94 *Harv. L. Rev.* 1244 (1981); G. Hazard and W. Hodes, *The Law of Lawyering*, (1985). *Compare*, ABA Model Rules of Professional Conduct, 1.7, 1.8 (j), 6.3, 6.4 (1983).

3.4(a), (c), (d) & (f), 5.3(b)(1983). Indeed, no other attorney in Anderson County has ever even alleged that appellant has violated a rule or custom of professional courtesy.

**c. No evidence has been presented and no proof adduced that Appellant has violated DR 8-102**

DR 8-102(B) provides that "a lawyer shall not *knowingly make false accusations* against a judge or other adjudicatory officer." (emphasis added). The Petition neither alleged any actions or comments by appellant that amounted to accusations of a judge, let alone false accusations, let alone knowingly false accusations. In addition, the Disciplinary Counsel presented no evidence whatsoever in support of this particular charge. Moreover, neither the Panel nor Chancellor Inman found that any such false accusation had been made by appellant about any judge at any time.

**d. No evidence has been presented and no proof adduced that Appellant has violated DR 1-102(A)(4)**

DR 1-102(A)(4) provides that "a lawyer shall not: ... engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Once again, no evidence has been proffered and no proof found that appellant, at any time, in any manner, on any occasion, engaged in conduct that even arguably involved dishonesty, fraud, deceit, or misrepresentation. These allegations of conduct, that, at minimum, constitute moral turpitude and arguably involve violations of criminal laws as well as disciplinary proscriptions, are utterly and completely bare. Unfortunately, the allegation itself substantially and unjustifiably besmirches the reputation of a public servant.

**e. No evidence has been presented and no proof adduced that Appellant has violated DR 7-106(C)(6)**

DR 7-106 provides, in pertinent part:

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

...

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

No specific allegation has been made of any conduct that might be described as degrading to a tribunal, no evidence offered, no proof found.

**f. No evidence has been presented and no proof adduced that Appellant has violated DR 7-106(C)(7)**

DR 7-106 also provides, in part:

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

. . .

(7) Intentionally or habitually violate any established rule of procedure or of evidence.

The Disciplinary Counsel has not presented any evidence regarding, and the Hearing Panel and Chancellor Inman have not found any proof showing that appellant engaged in any habitual or intentional violation of any established rule of procedure or evidence.

**g. No evidence has been presented and no proof adduced that Appellant has violated DR 7-106(A)**

DR 7-106(A) states: "A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling." Once again, the Disciplinary Counsel has not alleged, much less introduced evidence of, let alone proved, that appellant in any way, at any time, in any fashion, to anyone, disregarded a standing rule of a tribunal.

## V. CONCLUSION

Appellant respectfully submits that he has demonstrated multiple reasons why the order of suspension entered below cannot be permitted to stand. These grounds include jurisdiction, due process, constitutional rights to free speech, and the sufficiency of the evidence as a matter of law.

Appellant's arguments do *not* relate in any way to the merits of the dispute between him and Judge Scott. Appellant does not ask this Court to make any judgment whatsoever about the political conflict between him and the Judge. Reversal of appellant's suspension is required not for reasons of personality or politics, but because the law and the constitutions of both this state and the United States require it.

The rights at issue here implicate some of the most serious challenges to liberty and some of the most important questions about the operation of government: separation of powers among the branches of government; judicial control over elected public officials; procedural due process; free speech; and the fundamentals of notice and adequate proof. Some of these are questions of procedure, but they are no less constitutionally important, as the facts of this case bring to mind Justice Frankfurter's famous aphorism that "[t]he history of liberty has largely been the history of observance of procedural safeguards."[50]

Finally, even though this case has its genesis in a matter which has created public controversy, this Court's obligation to protect appellant's rights is in no way diminished. As this Court recognized more than 150 years ago, one of the primary purposes of the "law of the land" provision of the Tennessee Constitution, Article I, Section 8, is to protect *all* people, regardless of the controversy of the moment.[51]

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[50] *McNabb v. United States*, 318 U.S. 322, 347 (1943).

[51] *Walley's Heirs v. Kennedy*, 10 Tenn. 554 (1831); *Dibrell v. Morris' Heirs*, 15 S.W. 87 (Tenn. 1891). *See also*, *Chambers v. Florida*, 309 U.S. 227, 241 (1940):

> "Under our constitutional system, courts stand against any winds that blow, as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."

# APPENDIX

## APPENDIX A -- Explanation of Citations and References to the Official Record

The official record in this case consists of four separate and self-contained files together with their sundry attachments, all of which have been consolidated by agreed order of this court dated May 9, 1988.

These files are physically described as follows:

### I. Board File ("BF")

(1) The complete record of the administrative proceedings from April 18, 1985 (when Judge Scott first complained to Disciplinary Counsel in File No. 3599-2-H) to the last order filed by the three-man Hearing Panel on June 11, 1987, is contained in a large grey cardboard box marked, "Collective Exhibit No. one (1) in Case No. 2736-7-CM *James N. Ramsey v. Board of Professional Responsibility of the Supreme Court of Tennessee*" and stamped "filed Jun [sic] 6, 1988, Robert W. Summar, Clerk."

This large grey cardboard box contains 33 separate or collective Board documents.

These documents are not consecutively paginated or marked in any manner except chronologically by the stamped date of filing in the office of the Board of Professional Responsibility by Mary Woodroof, Executive Secretary to the Board. Appellant has arranged these documents chronologically, but since there is no guarantee they will not be inadvertently "shuffled" by a later peruser of this voluminous "Board File," he has selected the following most frequently cited documents for special identification for purposes of this brief.

(a)The "Petition for Discipline", No. 85-252-2, filed with Executive Secretary Mary Woodroof on 8-29-85, in the Board of Professional Responsibility, will hereinafter be called "BF-1" for "Board File No. 1" and any exhibits thereto will be internally referenced to that code -- for example, an item to be referenced at pages three and four of the four-page exhibit A will be designated "BF-1, A, at p. 3-4."

(b)The two-volume transcript of the Administrative Panel Hearing of the Board of Professional Responsibility which began on March 16, 1987, will be referenced "BF-25, I, p. 100" (for volume one, page 100) or "BF-25, II, p. 90" (for volume two, page 90). It is the 25th unnumbered but chronological unit within the "Board File", hence BF-25; and it has 46 numbered exhibits which are contained in two units (BF-26 and BF-27).

(c)The "Motion to Vacate Panel Decision and Motion to Disclose Totality of Conflict of Interest" together with its 13 exhibits will be referenced "BF-29," with page or exhibit numbers following.

(d)The seven-page decision of the Hearing Panel in "Board File" No. 85-252-2, filed April 8, 1987 and captioned, "Findings and Judgment" will be referenced, "BF-28," with any necessary page numbers following.

(e)Other documents in the "Board File" will be referenced "BF" (for "Board File"), with the appropriate filing date following and the caption of the document in quotation marks with relevant page numbers following. This formula should cover any document anywhere within the "Board File" (BF).

(f)Please note that the large grey cardboard box which contains the "Board File" and constitutes "collective exhibit 1 (one)" in Case No. 2736-7-CM (which is SC-49) also contains certain audio tapes as well as documents. Please note further that the two-volume transcript (BF-25) has 46 exhibits appended thereto, in two large brown open file folders, which relate exclusively to the transcript of the March 16, 1987 Panel hearing.

II. SC-49

(2)The appeal on the merits from the Panel hearing exists in three manila legal-size court file folders together with a 124-page "Transcript of Proceedings" stamped "filed 3-25-88, 9:18 o'clock a.m., Forrest Bridges, Clerk & Master." These four documents are further marked in heavy black ink with roman numerals I, II and III (with Vol. III being the "Transcript of Proceedings"); however, the fourth of these is not so marked and is the "Transcript of

Proceedings and *Exhibits*," with a heavy black ink line under the word "*Exhibits*." Thus, there are a total of four documents, three of which (including the "Exhibits" are in manila legal-size file folders and a fourth, marked "III" is a letter-sized blue "Transcript of Proceedings," hereinafter referenced "SC-49, III, Trans."

All four of these are marked "Transcript, 2736-7-CM, SC No. 49, Anderson." Only the two marked "I" and "II" are consecutively paginated to page 206.

Hereinafter this appeal on the merits file will be referenced "SC-49," and, where necessary, page numbers will follow, for example, "SC-49, p. 100."

**III. SC-48**

(3)The "Interlocutory" appeal on the question of jurisdiction which commenced after the November 22, 1985 Panel hearing in the Board of Professional Responsibility is contained in two manila legal-size court file folders. These two documents are further marked in heavy black ink as roman numerals I and II.

All of these are marked "Transcript, 1397-7-CM, SC No. 48, Anderson Chanc. [sic]," and are consecutively paginated to page 263.

Hereinafter, this Interlocutory appeal file will be referenced "SC-48," and where necessary page numbers will follow, for example, "SC-48, p. 201."

Please note that SC-48 and SC-49 were consolidated by order of this Court on May 9, 1988.

**IV. Rule 11 Petition**

(4)Prior to consolidation of SC-48 and SC-49, a "Petition Pursuant to Supreme Court Rule 11, I(5)(6)" had been filed on November 12, 1986, directly with this Supreme Court. It was not numbered, but was physically filed with the Clerk in file SC No. 48, and is physically bound to that file by a rubber band and string. It is anecdotally identified by the large brown mailing envelope in which it was posted November 10, 1986 and certified as "p 437-115-449."

## V. Summary of References Used In This Brief

Hereinafter reference will be made to these four consolidated Supreme Court files as:

(1) "BF" (for "Board File");

(2) "SC-48" (for the Interlocutory appeal);

(3) "SC-49" (for the appeal on the merits); and

(4) the "Rule 11 Petition."

This will be especially useful with respect to "Collective Exhibit 1" of SC-49, which is the Administrative "Board File", contained in the large grey cardboard box with thirty-three unmarked units (a one-page document is a "unit", and a brown file of documents by this definition is a unit -- the exhibits to the two-volume "transcript of the Administrative Panel Hearing" (BF-25)).

## APPENDIX B -- Additional Factual Summaries

The instant Disciplinary Board action is not the first time that Judge Scott has sought to have appellant disciplined. Judge Scott has previously filed seven other complaints. Six were dismissed -- (M-947, filed Oct. 17, 1979; M-972, filed Nov. 1, 1979; M-1094, filed Mar. 19, 1980; M-1174i, filed May 14, 1980; M-1367i, filed Oct. 27, 1980; and M-1479i, filed Oct. 16, 1981) -- while one remains pending (File No. 3718-2-8, filed June 18, 1985). These prior disciplinary proceedings are discussed *intra*.

### Summaries of Prior Disciplinary Proceedings

#### 1. Door Slam Incident

On February 2, 1979, appellant and his assistant, Jan Hicks ("Assistant Attorney General Hicks"), were in court for the scheduled jury trial of *State v. Sally Davis*. (BF-25, p. 32) Defense counsel, on the day of trial, filed a motion to suppress the defendant's confession (*Id.*, l. 17-18) -- a confession which was the most crucial piece of evidence in the State's case and without which the State could not prevail. (SC-49, III, "trans." p. 22.) While the jury panels waited, the trial judge, James B. Scott, held a hearing in Chambers on the motion. (BF-25, Ex. 41, 2-21-79, "Transcript of In-Chambers Hearing".) Despite the State's insistence that TRCrP 12 required the judge to decide the motion *before* trial in order to protect the rule, the judge stated he would rule on the admissability of the Confession at the time that the State tried to present it *during* the trial. (*Id.* at p. 13.) The appellant then announced to the Court that he could not allow jeopardy to attach before the suppression issue was decided and that therefore he would enter a nolle prosequi in order to protect the state and then decide a future course of action. (*Id.*, p. 13.) The Judge accepted the nolle prosequi. (*Id.*, p. 19.) The parties all returned to the courtroom and the judge criticized the appellant before the jurors and announced that the jury panels were dismissed. (BF-25, Ex. 42, 2-21-79, "Transcript, Open Court Hearings", p. 4.) The appellant then rose (his assistant remaining) (*Id.*, p. 5) and (SC-49, III, "trans.", p. 24) and he walked out of the

courtroom into his office which adjoined the Courtroom, and when he closed the door to his office the heavy door, which had no device to slow the closing, slammed shut. (SC-49, III, "trans.", p. 24.) Judge Scott filed a complaint with the Board. (BF-3, 9-12-85, "Amendment to Answer," Ex. 1, "File M-972".) The Board dismissed the complaint. (SC-49, p. 146.)

**2. Culbertson Incident**

On 10/16/79, the assistant District Attorney, Jan Hicks, and defense counsel appeared on the trial date of *State v. Dale Culbertson* to announce to the trial Judge, James B. Scott, a plea agreement in the case. (SC-48, p. 108.) During the in-chambers discussion of the plea papers, the defense attorney and assistant D.A. indicated that a misunderstanding had occurred regarding one portion of the plea agreement which had been reached between defense counsel and the appellant the day before. (*Id.*, p. 111 and p. 89, paragraph D.) The Judge asked Ms. Hicks where the appellant was. (*Id.*, p. 112.) Ms. Hicks told the Judge she could call him on the phone and have him appear, (*Id.*, p. 113), but that she had been prohibited (SC-49, III, "trans.", p. 28 and p. 29) from telling the whereabouts of the appellant because of the confidential nature (SC-49, III, "trans.", p. 67 and p. 104) of the business he was conducting that morning. Appellant was in fact scheduled for a meeting with Department of Revenue investigators (*Id.*, p. 104) in a room in the courthouse -- not his office -- to discuss criminal investigation of courthouse personnel, some of whom were friends or associates of the trial judge. (SC-49, III, "trans.", p. 73; and SC-49, III, "trans.", p. 102, p. 104, and p. 105.) The Judge refused to allow the assistant to call the appellant (SC-48, p. 114) and had her jailed for contempt. (*Id.*, pp. 113-14.) The assistant remained in jail for almost two hours before the Judge put down a brief written order. (SC-49, III, "transcript", p. 31.) After the order was shown to the appellant who came to the jail after learning of the incident, he authorized the assistant to go into Court and to tell the Judge that he (the appellant) was in his office. (*Id.*, p. 31.) By the terms of the order, this would secure her release from custody. This the assistant did. (*Id.*, p. 31.) Whereupon the Judge had the appellant taken into custody (SC-48, p. 88) by armed deputies and

brought into the courtroom (SC-49, p. 57, stipulated at SC-49, III, "trans.", p. 10) and began interrogating the appellant. (BF-25, Ex. 39, "transcript of the Evidence October 16, 1979", at pp. 5-9.) The appellant here asserted his right to remain silent and his right to have an attorney -- stating that he was asserting his rights as a citizen under the Constitution. (*Id.*, p. 7.) Because he would not answer questions, he was held in contempt by the judge and jailed. (BF-25, Ex. 3, "In re: James N. Ramsey, Docket No. C-2144", pp. 1-2, dated 10-16-79.) Judge Scott filed a complaint with the Board. (BF, 9-12-85, "Amendment to Answer", Ex. 2, "File #M-947".) The Board dismissed the complaint. (SC-49, p. 146.)

**3. First Grand Jury Letter Incident**

On February 13, 1981, appellant, as a citizen, mailed a letter containing information to members of a sitting Grand Jury. (BF-1, Ex. G, p. 2, paragraph 4.) This grand jury was investigating allegations against two county commissioners, one of whom was also criminal investigator for the appellant's office. (*Id.*, p. 2, paragraphs 1-2.) There was a special prosecutor representing the State, after the appellant recused himself. (*Id.*, p. 2, paragraph 3.) It is uncontradicted that the information sent in the letter was truthful and accurate. (SC-49, III, "Trans.", pp. 82-83.) The two targets of the investigation were acquitted of all criminal charges. (SC-49, p. 71.) Judge James Scott cited the appellant for contempt for mailing the letter and Judge William Russell, appointed by the Supreme Court to hear the case, dismissed the contempt and held that the appellant's acts were privileged under the First Amendment. (SC-49, p. 72.) Judge James B. Scott filed a complaint with the Board. Despite the First Amendment privilege, the Board suspended the appellant. (BF-25, Ex. #5, 6-30-82, "order", pp. 3-7, "Findings and Judgment of Hearing Committee".) A court (Judge Leonard Martin) later reduced the suspension to a verbal reprimand and the case was not appealed. (BF-25, Ex. #5, 6-30-82, "Order".)

**4. Second Grand Jury Question Incident**

On April 22, 1983, the appellant walked into the courtroom to get a file from his assistant, who was handling routine arraign-

ments and motions in the Court of Judge James Scott. (SC-49, III, "trans.", p. 42.) Without any prior notice or warning, the Judge began interrogating the District attorney about the grand jury. (*Id.*, pp. 42-44.) Concerned for grand jury secrecy and uncertain about the legal issues presented, the appellant respectfully asked the Judge to put what he wanted into a written order (BF-1, Ex. I, at p. 3, and audio tape at BF-25, Ex. 44 therein) also (SC-49, III, "transcript", p. 74) so that the appellant would know what was required, have time to consider the legal issues, and decide whether or not the order should be appealed. (BF-25, II, p. 14.) The Judge said he would put down a written order, but did not. (BF-25, II, p. 14 and stipulated at SC-49, III, "trans.", p. 10.) The Judge held the appellant in contempt for not answering his questions immediately and fined him $50.00. (BF-1, Ex. I.) The entire verbal exchange took two minutes in open court before spectators. (BF-25, II, p. 11.) Appellant appealed the conviction and it was upheld. (SC-49, pp. 65-69.)

**5. Capias Report Incident**

On 9/02/84, Judge James Scott and his brother-in-law (stipulated at SC-49, III, "trans.", p. 11), Chancellor Allen Kidwell, without any prior discussion with the appellant (SC-49, III, "trans.", p. 11), enacted two new local rules of Court imposing new unprecedented and burdensome duties on the appellant. (BF-25, "trans." II, pp. 81-83.) The appellant by rule was required to prepare *all* orders in criminal cases for the Judge -- this has amounted to thousands of orders typed by the appellant. (SC-49, III, "trans.", p. 88.) Secondly, the appellant was required to prepare a "unique capias report" at intervals for the court.

Appellant, upon the learning of the rules, expressed the problems he would have with them to Judge Scott, especially the fact that the documents required for the capias report were in the hands of the clerk and the sheriff and never in the custody of the appellant. (SC-49, III, Ex. 1; BF-25, II, pp. 83-84; *see also* BF-25, Ex. 27 thereto.) Despite these difficulties, appellant did file capias reports. (SC-49, III, "trans.", p. 87.) Each time he filed one, the Judge expressed disapproval of it and the appellant filed another

trying to satisfy the Judge. (BF-25, I, p. 71 and BF-25, II, p. 111.) Judge Scott remained dissatisfied with the capias reports and cited the appellant for contempt. (BF-25, Coll. Ex. 1 at p. 2.) When the appellant filed a motion to recuse Judge Scott from hearing this contempt citation, and for an impartial judge (*Id.* at p. 32), Judge Scott took offense at the motion and again cited the appellant for contempt for filing the motion. (*Id.* at p. 123, after news clips.) Nonetheless, he did recuse himself, so the "contemptible" motion was, in fact, granted. Judge James Witt heard the contempt case and found the appellant in contempt. (SC-48, p. 72.) The case was not appealed. (SC-49, III, "trans.", pp. 88-89.) Judge Scott filed a complaint with the Board. (BF-1, Ex. A, pp. 1-2.) Two months later he filed another complaint with the Board about the same rule concerning his dissatisfaction with the appellant's performance in preparing orders. The Board has not acted upon the complaint.

**6. Statements to the Press**

Appellant has denied making the statement alleged in the petition published in the *Oak Ridger* 2/23/79 regarding "mucking up my cases." (SC-48, p. 127, paragraph 1.) The trial court found that the appellant did not make this statement (SC-49, p. 201), indicating that the trial court found appellant to be a credible witness.

As to the other statements made by the appellant cited in the petition and admitted by him, there is no allegation or proof that the factual statements made are false or that the statements which are expressions of opinion, are opinions which it are unethical for an attorney to express openly. (BF-25, II, pp. 100-103.)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing Brief of James N. Ramsey was served upon William W. Hunt, III, Board of Professional Responsibility of the Supreme Court of Tennessee, Suite 408, 1101 Kermit Drive, Nashville, TN 37217, by placing same in the United States Mail, first class postage prepaid, and addressed to said counsel at his last known address.

This 6 day of July, 1988.

JAMES E. FOGLESONG

**Exhibit N**

FILED
September 6, 1985
DOCKET NO. _____
BOARD OF
PROFESSIONAL
RESPONSIBILITY
OF THE SUPREME
CCURT OF _____
Mary Woodroof

**IN DISCIPLINARY DISTRICT II**
**BOARD OF PROFESSIONAL RESPONSIBILITY**
**SUPREME COURT OF TENNESSEE**

**IN RE: JAMES N. RAMSEY**

**ANSWER**

RESPONDENT DOES NOT BY THE FILING OF THIS RESPONSE ACKNOWLEDGE JURISDICTION OR WAIVE ANY DEFECT IN JURISDICTION AS STATED IN PARAGRAPH 2.

In response to each of the numbered paragraphs of the Petition, respondent would show:

1. Respondent James N. Ramsey is the duly elected District Attorney General for Anderson County, Tennessee and has held this office since September 1, 1978.

During this period of time he has not engaged in the private practice of law.

2. Respondent acknowledges the jurisdiction of the Board of Professional Responsibility (hereinafter called "Board") only with respect to the private letter of July 28, 1976. The Board has no jurisdiction with respect to all other alleged matters which arose during the course of Respondent's official duties as District Attorney. Neither the Board nor its appointed members, nor its creator can by court rule usurp the authority vested in the Legislature (representatives of the people) by Article V Section 4 and Article VI Section 6 of the Tennessee Constitution over the conduct of certain Judges and District Attorneys in office. Assuming arguendo that the Board could make findings regarding law licenses of duly elected district and supreme court judges

and state's attorneys, the Board has no lawful access to any sanction, such as suspension or disbarment which could affect the performance of duties of these officeholders who are subject to removal by impeachment. Any other conclusion totally vitiates the purpose of the constitutional provision of impeachment.

3. The complaint filed by James B. Scott on April 18, 1985 and the responses are adequately reproduced. Respondent denies any violation of any disciplinary rule.

4. On March 9, 1979 an order was entered based on a contempt action initiated by James B. Scott because of slamming a door. His order is adequately reproduced. Respondent denies any violation of any disciplinary rule. This event is not within any applicable statute of limitations and is barred by laches.

5. Respondent acknowledges that The Oak Ridger newspaper printed Exhibit C. The quoted language, "My bottom line is that the judge is mucking up my cases and I can't stand for that" is clearly an expression of opinion and of state of mind and protected by the First Amendment to the United States Constitution. Respondent cannot be certain that he actually said these words. However they do adequately reflect how Respondent felt at that time. Respondent denies any violation of any disciplinary rule. This event is not within any applicable statute of limitations and is barred by laches.

6. On October 16, 1979 James B. Scott held respondent in contempt because he didn't answer a question. Exhibit D is adequately reproduced. Respondent denies

any violation of any disciplinary rule. This event is not within any applicable statute of limitations and is barred by laches.

7. Respondent acknowledges that The Oak newspaper printed Exhibit E. The quoted language, "I don't have time for this horse manure" is clearly an expression of opinion and of state of mind and protected by the First Amendment to the United States Constitution. Respondent cannot be certain that he actually said these words. However they do adequately reflect how Respondent felt at that time. Respondent denies any violation of any disciplinary rule. This event is not within any applicable statute of limitations and is barred by laches.

8. Respondent acknowledges writing The Guinness Book of World Records. Sending

items of possible interest to a respectable publisher of factual data and statistics is communication protected by the right to freedom of association and freedom of speech guaranteed by the First Amendment to the United States Constitution. As a public official and person of natural openness and honesty, Respondent is aware of no legal or ethical obligation to "cover up" the contempt and disciplinary actions filed against him. Respondent denies any violation of any disciplinary rule. This event is not within any applicable statute of limitations and is barred by laches.

9. On June 30, 198_ Respondent was censured based upon a complaint filed by James B. Scott for providing information to the Grand Jury. Exhibit G is adequately reproduced. Respondent denies any violation of any disciplinary rule.

This event is not within any applicable statute of limitations and is barred by laches.

10. Respondent acknowledges The Clinton Courier News newspaper printed Exhibit H. The quoted language, "When I find that I'm suspended by Almighty God, I'll know that I'm guilty of wrongdoing, not before", is clearly an expression of opinion and of state of mind and protected by the First Amendment to the United States Constitution. It is further an acknowledgement of a Supreme Being whose judgments are superior to those of an administrative Board in Tennessee. This belief, however unpopular, is also protected by the First Amendment to the U.S. Constitution. Respondent cannot be certain that he actually said these words. However they do adequately reflect how Respondent felt at that time. Respondent

denies any violation of any disciplinary rule. This event is not within any applicable statute of limitations and is barred by laches.

11. On April 25, 1983 James B. Scott again held Respondent in contempt for stated reasons which to this day are incomprehensible to Respondent and to any reasonable person reading the record. Exhibit I is adequately reproduced. Respondent denies any violation of any disciplinary rule. This event is not within any applicable statute of limitations and is barred by laches.

12. On April 15, 1985 Respondent was found in contempt for an inferior capias report in another action initiated by James B. Scott. Exhibit J is adequately reproduced. Respondent denies any violation of any disciplinary rule. This

event is not within any applicable statute of limitations and is barred by laches.

13. Respondent contends there is no "pattern" for being in contempt other than the common denominator that each action was initiated by James B. Scott. DR 1-102(A)(1), (4), (5), and (6) are so vague as to deny due process of law in failing to give adequate notice of what is prohibited and basically allows the Board to censure any attorney for anything. Nothing in paragraphs 3 through 12 relates to DR 7-106(A) and (C)(5), (6) and (7). Conduct of Respondent, which James Scott used to initiate contempt actions, would not be deemed to be criminal or unethical by any reasonable person of common understanding.

14. Statements alleged in paragraph 3 through 12 to have been made to the public

are protected by the constitutional right to freedom of speech. Respondent has made no knowingly false statements regarding any of the matters alleged in the petition ever to anyone and none are specifically alleged in the petition. Respondent's refusal to lie, or engage in hypocrisy or to misrepresent his true feelings and the situation as he honestly perceives it are the root cause of the contempt actions and disciplinary complaints initiated by James B. Scott.

15. Respondent was duly elected to the office of District Attorney after the news media's repeated references to the personal and political "feud" between himself and Judge James B. Scott. The suggestion in paragraph 15 of the petition that Respondent should cease to perform the constitutional and statutory duties of his office so that this judge may have a

district attorney more personally compatible with himself ignores the wisdom of the voters and the checks and balances they have deemed appropriate for the criminal justice system in Anderson County. The voters may through their elected representatives in the Legislature use the impeachment process to remove a district attorney or a judge. For an administrative board appointed by the judiciary to suggest that a rule enacted by the judiciary compels the district attorney to give up his office because of personal problems with a member of the judiciary is totally incompatible with the procedures set up by the Tennessee Constitution and indicates a regrettable lack of trust in the democratic process.

16. The "private informal" letter issued on July 28, 1976 stated that the case was "closed". It is a violation of due

process to raise a nine-year old admonition regarding a young attorney's possible failure of communication with one particular client after advising Respondent nine years ago that the matter was "closed". Taking the Board at its word that the matter was "closed", Respondent would make his decision regarding any appeal nine years ago without any notice that the Board can "open" what is "closed" and make "public" what is "private" whenever it chooses to do so in the remote future. Such a procedure does not comport with commonly accepted standards of fair play. Use by the Board in this petition of stale allegations going back to 1976 violates due process. The limitations period for action by the Board is one year by analogy to attorney's malpractice actions which serve a similar purpose.

17. The phrase "unfit to be a member of the bar" is so vague as to be meaningless and at once can be a compliment or an insult depending upon the speaker's general views regarding lawyers. In no way does the phrase describe facts to which a meaningful answer can be made.

18. Respondent denies any violation of a disciplinary rule.

Respectfully submitted this the 4th day of September, 1985.

/s/
James N. Ramsey, Respondent

STATE OF TENNESSEE
COUNTY OF ANDERSON

I, James N. Ramsey, having been duly sworn, make oath that the statements

contained in the foregoing Answer are true to the best of my knowledge, information and belief.

This the 4th day of September, 1985.

/s/
James N. Ramsey

Sworn to and subscribed before me
this the 4th day of September, 1985.

/s/ Betty L. Wise
Notary Public

My Commission Expires: June 24, 1986

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of this Answer to William W. Hunt III, Disciplinary Board of the State of Tennessee, 1101 Kermit Drive, Suite 405, Nashville, Tennessee 37217, by certified

mail No. P 437 115 438, Return Receipt Requested, on the 4th day of September, 1985.

/s/
James N. Ramsey

**Exhibit O**

[FILED]
August 29, 1985

Mary Woodroof

IN DISCIPLINARY DISTRICT II
OF THE
BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

IN RE: James Ramsey Docket No. 85-252-2

PETITION FOR DISCIPLINE

Comes now the Petitioner, Board of Professional Responsibility of the Supreme Court of Tennessee and pursuant to Rule 9, Rules of the Supreme Court of Tennessee, files this Petition for Discipline against the Respondent, James Ramsey, and in support would respectfully show:

(1.) The Respondent, James Ramsey, is an attorney admitted by the Supreme Court of Tennessee to

practice law in the State of Tennessee. Respondent Ramsey practices law in Clinton, Tennessee.

(2.) Pursuant to Section 1, of Rule 9, any attorney admitted to practice law in Tennessee is subject to the disciplinary jurisdiction of the Supreme Court, the Board of Professional Responsibility, the Hearing Committee, hereinafter established, and the Circuit and Chancery Courts.

(3.) On April 18, 1985, a complaint against the Respondent was filed and was designated File No. 3599-2-H. Pursuant to Rule 9, the Respondent was notified of this complaint and was afforded an opportunity to state his

position. The complaint and the responses thereto are attached as Collective Exhibit A to this petition.

(4.) On March 9, 1979 an order was entered finding Respondent Ramsey guilty of contempt by the Anderson County Criminal Court, the Honorable Joseph J. Nigro presiding. He was fined $50 and sentenced to five (5) days in jail; the jail sentence was suspended. There was no appeal. Exhibit B.

(5.) In regard to this contempt Respondent on February 23, 1979 was reported as having stated to The Oak Ridger: "My bottom line is that the judge is mucking up

my cases and I can't stand for that." Exhibit C.

(6.) On October 16, 1979 Respondent was again found guilty of contempt by the Anderson County Criminal Court, the Honorable James B. Scott presiding. Respondent appealed and the Court of Criminal Appeals found no reversible error. Collective Exhibit D. As a result thereof, Respondent spent some time in jail.

(7.) Amongst Respondent's statements to the press regarding this contempt on October 24, 1979 he was reported as having said to The Oak Ridger: "I don't have time for this horse manure." Exhibit E.

(8.) On March 30, 1981 Respondent wrote The Guinness Book of World Records requesting inclusion in same as "The District Attorney with most contempt and disciplinary actions filed against him." The Clinton Courier News on April 2, 1981 reported this letter. Collective Exhibit F.

(9.) An attorney-disciplinary action was brought against Respondent. On November 23, 1981 a Hearing Committee of the Board of Professional Responsibility recommended Respondent's law license be suspended for ninety (90) days. Respondent appealed and the discipline was reduced to

a public censure on June 30, 1982. Collective Exhibit G.

(10.) On December 3, 1981 Respondent was reported by The Clinton Courier News as having said of his suspension: "When I find that I'm suspended by Almighty God, I'll know that I'm guilty of wrongdoing, not before." Exhibit H.

(11.) On April 25, 1983 Respondent was again found guilty of contempt by the Anderson County Criminal Court, the Honorable James Scott presiding, and fined $50. Respondent appealed and the judgment of contempt was confirmed by the Court of Criminal Appeals on April 19, 1983. Collective Exhibit I.

(12.) On April 15, 1985 the Anderson County Circuit Court, the Honorable James C. Witt presiding, found Respondent again in contempt, fined him $50 and sentenced him to ten (10) days in jail. There was no appeal. Exhibit J.

(13.) Respondent's pattern of convictions for being in contempt of court as set forth in paragraphs three (3) through twelve (12) of this petition are violations of DR 1-102(A)(5), 7-106(A) and (C)(5)(6) and (7).

(14.) Respondent's remarks to the public as evidenced in paragraphs three (3) through twelve (12) of this petition and the exhibits

attached hereto, as well as in exhibit K to this petition, are gross, disrespectful, knowingly false, derogatory, and damaging to the legitimacy of, and trust in, the judicial system--in violation of DR 1-102(A)(5) and 8-102(B).

(15.) Respondent's independent professional judgment is impaired in his representation of the State due to his personal conduct with Judge James Scott. Respondent is thereby in violation of DR 5-101(A) for continuing to represent the State in such a situation.

(16.) Any discipline imposed in this cause should be aggravated by the public censure referred to in

paragraph (9) of this petition and a private informal admonition issued on July 28, 1976 and attached as Exhibit K to this petition.

(17.) Respondent's actions and omissions set forth in paragraphs three (3) through twelve (12) of this petition further involves conduct adversely reflecting upon Respondent's fitness to practice law, unprofessional conduct, and conduct rendering Respondent Ramsey unfit to be a member of the bar. Respondent Ramsey has hereby violated DR 1-102(A)(1)(5) and (6), and T.C.A. Sec. 23-3-201(5).

ALLEGED VIOLATIONS

(18.) Petitioner alleges that the acts and omissions of Respondent Ramsey violated T.C.A. Sec. 23-3-201; and, the Code of Professional Responsibility, in particular, the Disciplinary Rules--each of which constitutes a separate act of misconduct and each of which constitutes grounds for discipline, to-wit:

DR 1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) . . .

(3) . . .

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

DR 7-106 Trial Conduct.

(A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(1) . . .

(2) . . .

(3) . . .

(4) . . .

(5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(7) Intentionally or habitually violate any established rule or procedure or of evidence.

DR 8-102 Statements Concerning Judges and Other Adjudicatory Officers.

(A) . . .

(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

WHEREFORE, PETITIONER PRAYS, that a Hearing Panel be appointed to hear testimony and receive evidence in this cause and to make such fundings of fact and order such disciplinary action as it may deem appropriate.

Respectfully submitted,

/s/
William W. Hunt, III
Disciplinary Counsel

NOTICE TO PLEAD

TO: James Ramsey

You are hereby notified that you are required to file your answer with the Board of Professional Responsibility, 1101 Kermit Drive, Suite 405, Nashville, Tennessee 37217, and a copy of your answer upon Disciplinary Counsel within twenty (20) days after service of this Petition. If you fail to file an answer, the matters shall be deemed admitted.

/s/
William W. Hunt, III
Disciplinary Counsel

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of this Petition for Discipline to Respondent James Ramsey, Twenty-Eighth Judicial Circuit, Clinton, Tennessee 37716 by Certified Mail No. P33-

5495005, Return Receipt Requested, on the 29th day of August, 1985.

/s/
William W. Hunt, III
Disciplinary Counsel

**Exhibit P**

FILED
September 12, 1985
DOCKET NO. _____
BOARD OF
PROFESSIONAL
RESPONSIBILITY
OF THE SUPREME
COURT OF TENNESSEE
Mary Woodroof

**IN DISCIPLINARY DISTRICT II**
**BOARD OF PROFESSIONAL RESPONSIBILITY**
**SUPREME COURT OF TENNESSEE**

**IN RE: JAMES N. RAMSEY**

**AMENDMENT TO ANSWER**

**RESPONDENT DOES NOT BY THE FILING OF THIS RESPONSE ACKNOWLEDGE JURISDICTION OR WAIVE ANY DEFECT IN JURISDICTION AS STATED IN PARAGRAPH 2 OF THE ANSWER.**

1. Respondent has located some old records of his own indicating that the Board has already acted on the allegations alleged in paragraphs 4 and 6 of the Petition and has resolved those issues in Respondent's favor (Exhibits 1 and 2). In addition to the defense of limitations and laches, Respondent also contends that the Board is precluded by doctrines of res

judicata, collateral and equitable estoppel, and due process of law, from relitigating allegations raised in paragraphs 4 and 6 of the Petition.

2. Respondent also contends that he has suffered prejudice from the resurrecting of old complaints dating back to 1976 in that he has relied to his detriment on the action and inactions of the Board and cannot find records, notes and witnesses to litigate these issues as due process requires.

3. To the extent that Respondent must raise at this stage mitigating factors regarding prior incidents already adjudicated, Respondent would show an extended history of provocations by Judge James B. Scott leading up to those adjudicated incidents wherein Judge James B. Scott from both the bench and off the

bench engaged in harassment, and rude insults directed at Respondent and his staff attacking his integrity, and engaged in harassment wherein Judge James B. Scott enacted petty rules or gave petty orders to and asked inconsequential questions of Respondent with the purpose of creating strife and opportunities for the use of judicial contempt powers; none of these rules, orders, or questions being necessary or even desirable for the proper conduct of Judge Scott's judicial office.

4. That at all times Respondent acted in a manner he considered to be consistent with the duties of his office to prosecute crime, protect the innocent, avoid infringement into the duties and functions of other office holders and to conduct the business of his office in an efficient manner consistent with the laws of the land. To the extent that defendant

failed to challenge by appeal process the validity of the rules, orders and questions referred to, this occurred because no opportunity was given for appeal (as in the allegations of Petition paragraphs 6 and 11 wherein the judge demanded immediate answers) or because Respondent was complying with a rule in a manner later determined to be inadequate (as in the allegations of Petition paragraph 12).

5. Based on a record Respondent found in his personal files, he now amends paragraph 10 by deleting the words, "Respondent cannot be certain that he actually said these words". Respondent admits writing these words and supplies Exhibit 3 (the document) to show the full context of the statement, which was made upon learning of the 90 day suspension. The statement is clearly an expression of

opinion and of state of mind and is protected by the First Amendment to the United States Constitution. Respondent denies any violation of any disciplinary rule. This event is not within any applicable statute of limitations and is barred by laches. Subsequent to the statement but still within the disciplinary action to which it refers the suspension was reduced to a censure in Equity Court. The subjects of the Grand Jury indictment were found innocent when a judge declared at trial that the district attorney pro tempore did not even have a prima facie case upon which to proceed (Exhibit 4).

Respectfully submitted this the 9th day of September, 1985.

STATE OF TENNESSEE
COUNTY OF ANDERSON

/s/
James N. Ramsey,
Respondent

I, James N. Ramsey, having been duly sworn, make oath that the statements contained in the foregoing Amended Answer are true to the best of my knowledge, information and belief. This the 9th day of Sept., 1985.

/s/
James N. Ramsey,
Respondent

Sworn to and subscribed before me this the 9th day of September, 1985.

/s/
Betty L. Wise, Notary Public
My Commission Expires June 24, 1986

I hereby certify that I have mailed a copy of this Amended Answer to William H. Hunt, III, Disc. Board, September 9, 1985

/s/
James N. Ramsey,
Respondent

DISCIPLINARY BOARD
OF THE
SUPREME COURT OF TENNESSEE

June 18, 1980

CONFIDENTIAL

Honorable James N. Ramsey
District Attorney General
State of Tennessee
Twenty-Eighth Judicial Circuit
Clinton, TN 37716

Re: File Nos. M-946, M-947; M-970, M-971, M-972; M-1094; M-1128, M-1174

Dear General Ramsey:

I am pleased to advise you that the above complaints have been dismissed. This action was taken by the Disciplinary Board at its regular meeting June 6, 1980. These files are therefore closed.

Yours very truly,

/s/

Lance B. Bracy
Chief Disciplinary Counsel

**Exhibit Q**

[FILED
11/16/87]

IN THE ANDERSON COUNTY CHANCERY COURT

AT CLINTON, TENNESSEE

JAMES N. RAMSEY
PETITIONER

VERSUS Civil No. 2736-7-CM

BOARD OF PROFESSIONAL
RESPONSIBILITY
DEFENDANT

MOTION TO STRIKE

Comes the Petitioner by his Attorney James E. Foglesong and moves this Honorable Chancery Court to strike the allegations contained in paragraphs 4 and 6 of the Petition for Discipline for the following reasons:

1. The Board has already acted on the allegations alleged in paragraphs 4 and 6 of the Petition for Discipline and has resolved those issues in Respondent's favor. Exhibit A.

2. The Board is precluded by doctrines of res judicata, collateral and equitable estoppel, ad due process of law, from relitigating allegations raised in paragraphs 4 and 6 of the Petition for discipline.

3. These events are not within any applicable statute of limitations and are barred by laches.

4. The limitations period for action by the Board is one year by analogy to attorney's malpractice actions which serve a similar purpose.

5. Use of these allegations does not comport with commonly accepted standards of fair play and violates due process under the Fourteenth Amendment to the U.S. Constitution.

Respectfully submitted, this the 16th day of November, 1987.

/s/
James N. Ramsey,
Petitioner, Petitioner

/s/
James E. Foglesong
Attorney for
Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion to Strike has been delivered by mailing a copy of same, postage prepaid, by U.S. Mail the Defendant at Suite 405, The Oaks Tower, 1101 Kermit Drive, Nashville, Tennessee 37217 this the 16th day of November, 1987.

/s/
James E. Foglesong, Attorney

**Exhibit R**

[FILED
11/16/87]

**IN THE ANDERSON COUNTY CHANCERY COURT**

**AT CLINTON, TENNESSEE**

**JAMES N. RAMSEY**
**PETITIONER**

**VERSUS** **Civil No. 2736-7-CM**

**BOARD OF PROFESSIONAL RESPONSIBILITY**
**DEFENDANT**

## MOTION TO STRIKE

Comes the Petitioner by his Attorney James E. Foglesong and moves this Honorable Chancery Court to strike the allegations contained in paragraphs 5, 7, 8 and 10 of the Petition for Discipline for the following reasons:

1. Incidents alleged in paragraph 5 (statement in the press on February 23, 1979), Paragraph 7 (statement in press October 24, 1979), paragraph 8 (letter

reported in press March 30, 1981) and paragraph 10 (statement in press December 3, 1981) are matters upon which the Board took no action when they arose some four to six years prior to the filing of their Petition.

2. It is by now clearly established that attorneys have first amendment rights to freedom of speech and that administrative rules must recognize this. In Re Snyder 105 S.Ct. 2874 (1985) and Garrison v. Louisiana 85 S.Ct. 209 (1964).

3. Petitioner also has first amendment rights as a public official and as a person who was being charged with criminal acts (contempt). U.S. v. Harold Ford #87-5686/5695, 6th Circuit, September 25, 1987.

4. The limitations period for action by the Board is one year by analogy to

attorney's malpractice actions which serve a similar purpose.

5. Use of these allegations does not comport with commonly accepted standards of fair play and violates due process under the Fourteenth Amendment to the U.S. Constitution.

Respectfully submitted, this the 16th day of November, 1987.

| | |
|---|---|
| /s/ | /s/ |
| James N. Ramsey, Petitioner, Petitioner | James E. Foglesong Attorney for Petitioner |

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion to Strike has been delivered by mailing a copy of same, postage prepaid, by U.S. Mail the Defendant at Suite 405, The Oaks Tower, 1101 Kermit Drive, Nashville, Tennessee 37217 this the 16th day of November, 1987.

/s/
James E. Foglesong, Attorney

**Exhibit S**

[FILED
11/16/87]

IN THE ANDERSON COUNTY CHANCERY COURT

AT CLINTON, TENNESSEE

JAMES N. RAMSEY
PETITIONER

VERSUS Civil No. 2736-7-CM

BOARD OF PROFESSIONAL
RESPONSIBILITY
DEFENDANT

MOTION TO STRIKE

Comes the Petitioner by his Attorney James E. Foglesong and moves this Honorable Chancery Court to strike the allegation contained in paragraph 9 of the Petition for Discipline for the following reasons:

1. The Board has already acted on the allegation alleged in paragraph 9 of the Petition for Discipline.

2. The incident cited in paragraph 9 (wherein Petitioner supplied information to a grand jury) was concluded on June 30, 1982, by court decision which did not follow the Board's recommendation.

3. The Board is precluded by doctrines of res judicata, collateral and equitable estoppel, and due process of law, from relitigating this question.

4. This event is not within any applicable statute of limitations and is barred by laches.

5. The limitations period for action by the Board is one year by analogy to attorney's malpractice actions which serve a similar purpose.

6. Use of these allegations does not comport with commonly accepted standards

of fair play and violates due process under the Fourteenth Amendment to the U.S. Constitution.

Respectfully submitted, this the 16th day of November, 1987.

| | |
|---|---|
| /s/ | /s/ |
| James N. Ramsey, Petitioner, Petitioner | James E. Foglesong Attorney for Petitioner |

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion to Strike has been delivered by mailing a copy of same, postage prepaid, by U.S. Mail the Defendant at Suite 405, The Oaks Tower, 1101 Kermit Drive, Nashville, Tennessee 37217 this the 16th day of November, 1987.

/s/
James E. Foglesong, Attorney

**Exhibit T**

[FILED
11/16/87]

IN THE ANDERSON COUNTY CHANCERY COURT

AT CLINTON, TENNESSEE

JAMES N. RAMSEY
PETITIONER

VERSUS Civil No. 2736-7-CM

BOARD OF PROFESSIONAL
RESPONSIBILITY
DEFENDANT

MOTION TO STRIKE

Comes the Petitioner by his Attorney James E. Foglesong and moves this Honorable Committee to strike the allegation contained in paragraph 16 of the Petition for Discipline together with its exhibit marked "K" for the following reasons:

1. The alleged incident is more than

nine (9) years old and barred from use against Petitioner by laches.

2. The Board has declined to comply with discovery with respect to this allegation, claiming privilege under Section 25, Rule 9, thereby disallowing the opportunity for Petitioner to mitigate the conclusions alleged. Exhibit A attached.

3. The Board itself, by its notification dated July 28, 1976 stated, "This admonition is private and with it the file will be closed." The Board is estopped from further use of Exhibit K.

4. Petitioner's file on the case in question has long since been destroyed or lost, and it is impossible to reconstruct it completely.

5. The limitations period for action by the Board is one year by analogy to attorney's malpractice actions which serve a similar purpose.

6. Use of this allegation does not comport with commonly accepted standards of fair play and violates due process under the Fourteenth Amendment to the U.S. Constitution.

Respectfully submitted, this the 16th day of November, 1987.

| | |
|---|---|
| /s/ | /s/ |
| James N. Ramsey, Petitioner, Petitioner | James E. Foglesong Attorney for Petitioner |

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion to Strike has been delivered by mailing a copy of same, postage prepaid, by U.S. Mail the Defendant at Suite 405, The Oaks Tower, 1101 Kermit Drive,

Nashville, Tennessee 37217 this the 16th day of November, 1987.

/s/
James E. Foglesong, Attorney